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No. .....
IN THE

Supreme Court of the United States

October Term, 1983

KINNETT DAIRIES, INC.,

Petitioner,

vs.

DAIRYMEN, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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Questions Presented.

1. Does the Capper-Volstead Act provide such absolute immunity from the Sherman Act that large regional cooperatives may band together in cartel fashion to fix prices, divide territories and customers, restrict supplies and artificially interdict the movement of a basic nutritional commodity like raw milk, thereby permitting the cartel members to control prices, exclude competition and enhance their own power in downstream processing operations without such activities being considered "predatory" or "competition stifling" or otherwise giving rise to liability under Section 2 of the Sherman Act?

2. Assuming proof of anticompetitive conduct above and beyond such widespread cartelization is required to establish an agricultural cooperative's antitrust liability, is not such conduct shown where a member of such a cartel uses its power to:

- — force processors to forego alternative supplies by engaging in supply cutoffs and cutoff threats and by extracting full and committed volume supply contracts through a pattern of actual and threatened supply cutoffs, a course of conduct which, in a related case against the same defendant in another circuit,* has been held to demonstrate specific intent to monopolize;
- — unilaterally demand a price increase beyond the amount allowed by the contracts it extracted;
- — summarily cut off plaintiff's supplies on no notice in the middle of the tightest season in years when plaintiff refused to accede to the demand for more money;
- — terminate plaintiff's arrangements to haul milk from farms to its plant as retribution for plaintiff's having competed with the coop for supplies from individual farmers?

**United States v. Dairymen, Inc.*, 1981-2 Trade Cas. ¶ 64,302 (6th Cir. 1981), discussed in Sections III and VI *infra*.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Petitioner, Kinnett Dairies, Inc. ("Kinnett"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case (Court of Appeal No. 81-7308) on September 19, 1983.

Opinions Below.

The opinion of the Eleventh Circuit dated September 19, 1983, for which review is sought herein is reported at 715 F.2d 520 (11th Cir. 1983) (Appendix A).

The opinion of the District Court for the Middle District of Georgia, in which the case was tried, is dated March 10, 1981 and is reported at 512 F. Supp. 608 (M.D. Ga. 1981) (Appendix B).

Jurisdiction.

The judgment of the Court of Appeals was issued October 24, 1983 and entered by the district court on October 31, 1983 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

This case involves determination of the scope and application of Section 2 of the Sherman Act, 15 U.S.C. § 2. and Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, which are set out in full in Appendix F hereto.

STATEMENT OF THE CASE.

I.
FACTUAL BACKGROUND.

A. Nature of the Claim.

This is an antitrust action brought by petitioner Kinnett against Dairymen, Inc. ("DI"), pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to secure damages and injunctive relief for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

B. The Parties and Their Competitive Positions.

Kinnett is a Georgia corporation with its principal place of business in Columbus, Georgia.[1] Kinnett is primarily engaged in the processing of Grade A milk for fluid consumption.

DI is an agricultural milk marketing association organized and existing under the laws of the State of Kentucky.[2] DI is composed of individual dairy farmers who produce raw

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[1]*See* Stipulation of Facts ¶ 2 (filed June 13, 1980) (hereinafter referred to as "Stip. ¶") which may be found in the Record on Appeal beginning at page 1874. The Record on Appeal will hereinafter be referred to as "R." The Record Excerpts submitted to the Eleventh Circuit will be referred to as "R.E." The trial transcript will be cited as "Tr." The trial transcript in *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. ¶ 62,053 (W.D. Ky. 1978), *reversed in part and remanded*, 1981-2 Trade Cas. ¶ 64,302 (6th Cir. 1981), Slip Op. attached hereto as Appendix D (6th Cir. Sept. 21, 1981), will be cited as "Tr. *U.S. v. DI.*" Depositions taken in this case will be cited as "Dep.," and depositions taken in *United States v. Dairymen, Inc.* will be cited as "Dep., *U.S. v. DI.*" Depositions from *In re Midwest Milk Monopolization Litigation, Robert B. Alexander, et al. v. National Farmers Organization, et al., v. Associated Milk Producers, Inc., et al.*, JPML Docket No. 83, Civil No. 19191-1, 510 F. Supp. 381 (W.D. Mo. 1981), will be cited as simply "NFO."

[2]Stip. ¶ 4.

milk for commercial sale. DI was formed in 1968 through the merger of eight cooperatives in the southeastern United States. In 1970, DI succeeded to the interest of Georgia Milk Producers Cooperative Association ("GMPCA"), the only statewide cooperative in Georgia.[3]

During the period relevant to this action, DI was both a major competitor and a principal supplier of Kinnett. DI and Kinnett compete in the procurement of local supplies of raw milk and the sale of processed milk. DI and Kinnett own the only two dairies in Columbus, Georgia.

Continuously since 1969, DI has been by far the single largest supplier of raw milk in the Southeast.[4] Its very formation eliminated price competition among the eight associations that merged into DI and increased their bargaining strength accordingly.[5] Following that formation, DI continued to grow through numerous acquisitions of cooperatives in the Southeast.[6] These acquisitions enhanced DI's market power because they foreclosed alternative sources of supply and resulted in price increases to Kinnett and others.[7]

DI's share of the raw milk market in Kentucky, Tennessee, Georgia, Mississippi and Louisiana has ranged from 60.1% to 48.6%[8] and its share of the raw milk market in Georgia has ranged from approximately 60% to 75%.[9] Such market share figures understate DI's true market power in the Georgia marketing area because: (1) DI is a major factor in the sale of processed milk and milk products in Georgia,

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[3]Stip. ¶¶ 7, 113, 124, 134, 136; Tr. 1048-49, 1388-89, 1394-95, 1401-04; McDowell Dep. I, 8-9, 11-12, 18-19. The term "DI" is used herein to refer to DI and GMPCA.

[4]Stip. ¶ 122.

[5]Stip. ¶¶ 113, 114.

[6]*See* Stip. ¶¶ 112, 115, 118; PX 451, 452, 454, 458; McDowell Dep., *U.S. v. DI*, 17-19, 21, 23, 25-28; Morgan Dep. Q580-Q599.

[7]*E.g.*, Tr. 1073-75; *see also* n.6 *supra*.

[8]*U.S. v. Dairymen, Inc.*, 1983-2 Trade Cases, ¶ 65,651 at 69,299-35, 69,299-37 (W.D. Kentucky 1983).

[9]PX 477, 532a, b.

as well as its dominant supplier of raw milk,[10] (2) DI has collaborated with other cooperatives in and beyond Georgia in setting prices and controlling milk movements (Section C *infra*), and (3) DI dominates the areas to the north and northwest of Georgia which are the most likely markets to which Georgia processors would try to turn as an alternative.[11]

Thus, Georgia is at the insulated heart of DI's control area, and although DI has experienced some competition as a supplier of milk in outlying or fringe areas, there have been virtually no competitors within the DI marketing area at all.[12]

C. DI's Anticompetitive Cartel Activities With Other Cooperatives.

DI initially achieved a position of strategic, regional market dominance through internal growth and mergers. But it did not stop there. To the contrary, it proceeded systematically to eliminate virtually all sources of actual or even potential raw milk competition in and around the Georgia marketing area. Already the beneficiary of federal pricing regulations which prevent ruinous competition by establishing minimum prices for milk,[13] DI deliberately eliminated all competition above the federal floor.

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[10]Stip. ¶ 119; PX 451, 452, 454, 458; McDowell Dep., *U.S. v. DI*, 17-19, 21, 23, 25-28; Morgan Dep., Q580-Q599.

[11]Tr. 244-45, 635.

[12]PX 17, 73, 155, 353, 365, 381, 443, 444, 445, 451, 455, 499, 524; McDowell Dep. II, 35-36; McDowell Dep. VI 36-39; Moser Dep., *U.S. v. DI*, 45-51; Ortego Dep., Q1813-Q1823, Q1827-Q1831, Q1841-Q1843, Q1865-Q1871.

[13]In many areas of the United States, including Georgia and other parts of DI's marketing territory, raw Grade A milk is priced under Federal Milk Market Orders administered by the United States Department of Agriculture ("USDA") pursuant to the Agricultural Marketing Agreement Act of 1937. Stip. ¶¶ 69, 72.

Federal orders established minimum prices which regulated handlers must pay for raw Grade A milk according to the purpose for which the milk is used. Milk used for fluid products is classified as Class I and assigned a higher minimum price than milk used for manufactured products which is classified as Class II or Class III. Stip. ¶ 77.

First, the possibility of significant competition from other cooperatives in Georgia was eliminated through an organization called the Georgia Super Pool which was composed of the cooperatives in Georgia and represented some 90% of the milk in Georgia from 1969 through at least 1975.[14]

The Georgia Super Pool neutralized competition among Georgia cooperatives in two principal ways: (1) by requiring that excess or surplus milk (*i.e.*, milk not wanted by a member for its own processing plant) be sold through a single agent — DI, and (2) by the operation of an "equalization pool" or "repooling" function.[15]

Prior to the formation of the Georgia Super Pool, its members actively competed with each other in the sale of surplus milk.[16] The Super Pool halted this competition by obligating each member to sell *all* of its surplus milk through the Pool's agent, DI, for a fee of $.10/cwt.[17] Thus, as a direct consequence of the Super Pool Agreement, any Super Pool member's milk which is available for sale must be purchased through DI, at Super Pool (DI) prices and on Super Pool (DI) terms and conditions.[18]

In effect, then, the Super Pool operates as a group boycott or refusal to deal and as a customer allocation agreement since it effectively prohibits all members other than DI from taking on outside customers.[19]

The Super Pool's equalization fund pools the *over-order premiums* not included in the federal market administrator's calculations; revenues are put into a common "pot" and

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[14]Stip. ¶ 133; PX 524, p. 46.

[15]PX 20, 21.

[16]Tr. 2022-24; PX 69; Jones Dep., 37-38; Davenport Dep. I, 24, 51-52; Williams Dep., 15, 16-17; McDowell Dep. I, 104; McDowell Dep. V, 203-04.

[17]Tr. 140-41; PX 30; Davenport Dep. I, 20-22; McDowell Dep. I, 38, 104, 117.

[18]Stip. ¶ 131; Tr. 2020; PX 20-21, 69; McDowell Dep. I, 38, 104, 114-16, 117-18; Procter Dep. 11, 16, 42; Jones Dep., 26-27, 38, 68-69; Ortego Dep. II, Q1146-Q1148.

[19]Tr. 140-42, 647-49.

then divided among producers so as to equalize those whose milk was sold largely for the higher priced Class I uses with those whose milk was used more for lower priced Class II and III products.

This equalization *via* repooling prevents competition in two ways. First, it removes the incentive that would otherwise exist for the members to compete with each other on the basis of price to obtain high Class I utilization accounts.[20] Second, it allows the Pool members, who are themselves processors as well as producers, to maintain high *consumer* prices on *packaged milk* by acting as though they all are paying the same high raw material costs — *i.e.*, DI's over-order price — even though most of them are not buying raw milk at all but merely acquiring it from their own members.[21]

Hence, as a result of the Georgia Super Pool, prices to consumers are higher than they otherwise would be be,[22] based as they are on inflated raw milk "costs."

With the Super Pool neutralizing competition in Georgia, DI eliminated the possibility of intermarket arbitrage over a broad geographic region through an organization known as Great Lakes-Southern Milk, Inc. ("Great Lakes"). Great Lakes is composed of milk cooperatives whose marketing territories range from the Great Lakes to the Gulf of Mexico.[23]

Great Lakes functions basically as a forum for intermarket price-fixing, price alignment, and territorial and customer allocation.[24] Great Lakes members meet together, discuss market conditions and recommend prices that each will charge.[25] The recommendations as to prices and price align-

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[20]Tr. 144-49, 151-54, 650-54, 2002-11.

[21]Tr. 1548-50.

[22]Davenport Dep. I, 35.

[23]Stip. ¶¶ 152, 155.

[24]PX 42-110, 133, 138, 499; Lake Dep. I, 22-27; Mogen Dep. Q43-Q49, Q70, Q127-Q137, Q212-Q214; McDowell Dep. III, 123-24, 125; Ortego Dep., Q1480; Torgerson, Tr. *U.S. v. DI*, 3360-62; *see also* Stip. ¶¶ 161, 166-68, 173-76, 181-84.

[25]Stip. ¶ 161.

ments are generally followed.[26]

In the words of the coops themselves, the price alignment between markets "put an end to dairies playing one market or one coop against another to beat down prices," *i.e.*, an end to competition.[27] "[D]airy farmers simply cut off the then existing practice of sitting down with dairies and haggling over price. The Great Lakes Federation analyzed markets and decided on what was fair and then announced those prices to the dairies."[28]

Furthermore, each Great Lakes member has its own explicitly recognized marketing area; each basically sticks to that area; it is understood that others will do likewise; and, in addition, that they will give each other priority in the sale of milk.[29] Indeed, the members warn each other when a customer is seeking a price reduction and shopping around for alternative supplies.[30]

Finally, proceeding to stifle competition in ever-widening circles, DI, along with its Great Lakes confederates and other coops, eliminated the possibility of significant competition from surplus milk in the Minnesota-Wisconsin ("M-W") area through an operation called the Standby Pool.

The Standby Pool, now known as the Associated Reserve Standby Pool Cooperative ("ARSPC"), is another super-coop-organization composed of supposedly independent milk cooperatives in the Midwest and Southeast.[31]

Very simply stated, the Standby Pool performed two related operations: (a) it established a "reserve supply" of

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[26]Stip. ¶ 173.

[27]PX 64; Tr. 154-64, 238, 654-58, 718; PX 54, 57, 484; Buckley Dep. Q550-Q557, Q569-Q571; Lake Dep. II, 20-23, 26-27, 29-32, 35-37, 43-45; Morgan Dep., Q73-Q77.

[28]PX 54, 64, 526.

[29]Tr. 1059-64; PX 59, 97; Buckley Dep. Q424-Q427, Q430; Lake Dep. I, 17-18, 22-27; Lake Dep. II, 97-98; Morgan Dep., Q572-Q582; Ortego Dep. Q1160-Q1183.

[30]PX 70, 81; Buckley Dep., Q240-Q253, Q293-Q294, Q306-Q307; Ortego Dep., Q1531-Q1538, Q1606-Q1613.

[31]*See* Stip. ¶ 201.

milk by purchasing "options" on unregulated Grade A milk in the Upper Midwest where milk is especially plentiful, and (b) it purchased and sold milk from the reserve supply.[32] Members of the Standby Pool paid "assessments" for the right to call on its reserve supply even if they never actually did. Standby Pool plants in the Upper Midwest were paid for "standing by," even if their supplies were not actually called upon.[33] If a member did call upon the reserve supply, it would make additional payments for the milk itself.[34]

Prior to the formation of the Standby Pool, unregulated supplies of raw milk from the Upper Midwest had moved South during the spring flush season when they were not needed. This competitive process of M-W area suppliers vying for Class I outlets in the South eroded premium price structures by setting in motion a domino effect which radiated southward.[35] The Standby Pool was designed to and effectively did stifle this competitive process by keeping this milk off the market.

The option payments in effect "bribed" producers in the high production states of Minnesota and Wisconsin to keep and process their milk up in that area and not to sell into markets to the south in competition with the bargaining/marketing cooperatives there.[36]

At the outset, the Standby Pool's basic purpose and effect of protecting a premium price structure in southern markets by foreclosing the M-W area as an alternate source of supply

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[32]*See* Stip. ¶ 209.

[33]Tr. 187-90; PX 116, 134, 262, 263; Farr Dep., 179-80; Hanman Dep., 28-29; McDowell Dep I. 80-81; Westwater Dep., 250-51.

[34]Stip. ¶¶ 209, 210; PX 137, 144-148, 150.

[35]Tr. 164-65, 183-84, 193-99, 533-39, 658-62, 1005-10; PX 56, 81, 114-116, 122-123, 133, 171, 199, 213, 239; Hanman Dep., 28-29; Smith Dep., 191-93; Westwater Dep., 31, 44-46, 295-97.

[36]*Id.*; Stip. ¶ 215; Tr. 164-65, 530-31, 533-39, 658-62, 1005-10; PX 114-116, 122-123, 133, 135, 136 171, 199, 213; Smith Dep., 191-93; Westwater Dep., 31, 44-56, 295-97, 300-02.

were quite explicit and generally recognized.[37] Professional economists acting as advisors to the Standby Pool candidly described it as "an effective vehicle for immobilizing surplus supplies of milk" and noted that "as a direct result of implementing the Standby Pool" participants in the central United States were able to impose a lasting premium for the first time.[38] DI itself recognized that the Standby Pool had the anticompetitive purpose of ensuring that the supplies of milk in the northern states would not undercut premium prices in the South.[39]

In addition, in 1970 the Standby Pool began a market allocation program.[40] Each member was assigned a sales territory within which that member operated as the exclusive sales agent. ARSPC members who sold milk into the territory of another member were reprimanded and brought into line.[41] DI became the designated agent for essentially all of the Southeast, including Georgia and its environs. Thus, any milk under the control of ARSPC or one of its members was available to Kinnett, and others like Kinnett, only through DI, and hence *only* at DI's prices.[42] Given the

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[37]Tr. 164-65, 190-99, 537-39; PX 56, 58, 81, 114, 115, 116, 118, 119-125, 133, 137, 142, 144, 145, 163, 168, 171-173, 188, 196, 197, 199, 202, 203, 206, 213, 510, 526; Farr Dep., 60-62, 67-69, 72-73, 97-98, 143-44, 246-48, 250-52, 366-69, 373-74, 379-80; Hanman Dep., 28-29; Lake Dep. I, 82; McDowell Dep. IV, 39-40; Westwater *NFO*, 589-94, 630-31.

[38]PX 124.

[39]Tr. 193-99, 537-39; PX 4 p. 3, 172, 526; Ortego Dep., Q2035, Q2037.

[40]PX 160, 174, 176, 178-186, 203-205, 208, 209, 211, 217; Westwater Dep., 26-27, 80-82; Westwater *NFO*, 331-35, 413-14, 724-25, 728-30, 738-40, 742-46.

[41]PX 174, 178, 180, 183-186, 192-195; Hanman Dep., 80-81; Farr *NFO* II, 290-91; Ortego Dep., Q1187-Q1193, Q1219-Q1220, Q1121a-1126a; Westwater Dep., 118-19, 154-57, 159-60.

[42]PX 178, 180, 183, 186, 195, 209, 280-282, 287; Farr Dep., 180-83, 190, 237; Hanman Dep., 82; Westwater Dep., 80-85, 373-75, 376-81; Morgan Dep., Q138-Q139, Q156-Q157, Q165-Q166, Q168, Q171-Q173, Q179-Q180, Q189-Q198, Q226-Q252, Q259-Q262.

membership of ARSPC, this market allocation program foreclosed practically all conceivable sources of raw Grade A milk including spot loads, outside of Georgia.[43]

D. DI's Anticompetitive Unilateral Conduct — Abuse of Dependent Processors.

Once the series of anticompetitive arrangements with other coops described above were in place, DI instituted premium or over-order prices for Class I milk in Georgia marketing area. These were first announced on July 15, 1969 (as part of an agreed-upon Great Lakes price hike) to be effective August 1, 1969.[44] Since then, DI has continuously maintained over-order premiums on Class I milk. In April 1974, DI added similar premiums to Class II and Class III milk as well.[45] By DI's own admission, its premium prices are not a matter of negotiation with customers but are imposed unilaterally.[46]

Georgia processors, including Kinnett, repeatedly protested and shopped around to avoid DI's premium prices but, nevertheless, continued to pay those prices to DI on at least some part of their raw milk supply because no adequate alternative sources of supply existed.[47] Throughout this period, DI engaged in a pattern of heavy handed abusive

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[43]Tr. 171-74, 673-78; PX 240, 477, 517, 532E, 532F.

[44]Stip. ¶ 231.

[45]PX 285, 286, 291, 292, 345, 348, 354, 421, 466; McDowell Dep. I, 30-33, 62-63; McDowell Dep., *U.S. v. DI*, 32.

[46]Tr. 1051, 1157, 1592, 1979, 2642; PX 288, 295, 296; Conerly, Tr. *U.S. v. DI*, 2279-80; McDowell Dep. I, 62; McDowell Dep. III, 126-27; McDowell Dep. V, 20, 43-44; McDowell Dep., *U.S. v. DI*, 57-58; Morgan Dep., Q520a-Q522a, Q621-Q623, Q678-Q680, Q773-Q785; Ortego Dep., Q299; Thomas, Tr. *U.S. v. DI*, 580-83.

[47]*See* Stip. ¶¶ 233, 300; Tr. 1051-57, 1129, 1158, 1165-74, 1341-52; PX 17, 287, 293, 294, 302, 314, 410-412, 443, 451, 469, 492; DX 82; McDowell Dep. I, 35-38, 40-49, 55-56, 60-61, 63-66, 68-71, 74-77, 93-94, 97-98, 116-17; McDowell Dep. II, 47-48, 106-09, 112-14, 117-22; McDowell Dep. V, 146-48, 152; McDowell Dep., *U.S. v. DI*, 46-51, 180-81, 260, 339-44, 352-57, 363, 366-67, 406; Morgan Dep., 180-81; Ortego Dep., Q370-Q372, Q375-Q377, Q1667-Q1671, Q1813, Q1823, Q1827-Q1831, Q1841-Q1843; Thomas, Tr. *U.S. v. DI*, 597-600.

conduct designed to maintain this dependence.

First, in 1970 DI flatly refused to allow Kinnett to haul the milk of member farmers supplying Kinnett's plant, an operation which Kinnett had historically performed and wanted to continue to perform.[48]

DI claimed that Kinnett representatives were successfully attempting to convince members to leave the cooperative and sell milk directly to Kinnett.[49] There was no charge that any statements made by Kinnett in discussions with producers were false or that the contacts were improper. Thus, the termination was admittedly direct retaliation or punishment for Kinnett having fairly competed with DI for individual sources of milk.[50]

The following year, 1971, DI began to implement written sales agreements.[51] The original proposed contracts, termed full supply contracts, required DI's customers to buy from DI all of their supplies of raw milk beyond those then being provided by other "grandfathered" suppliers.[52]

DI pressured processors to sign the contracts by carefully timing their presentation to coincide with the autumn season when supply was tightest and demand highest,[53] and by issuing very thinly veiled cutoff threats to all handlers who did not sign promptly.[54]

In October 1971, after DI's full supply contracts were successfully challenged in a suit brought by an objecting

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[48]Kinnett preferred hauling its own milk because the operation was a profitable one and because Kinnett could better ensure that the quality and flavor of the milk was adequate. Stip. ¶ 338; Tr. 1067-68.

[49]Stip. ¶¶ 344, 345; Tr. 1876-83; McDowell Dep. III, 27-31, 38-41, 74; McDowell Dep. V, 177-79, 180-81, 182.

[50]*Id.*

[51]Stip. ¶ 244.

[52]Stip. ¶ 248.

[53]Stip. ¶ 249.

[54]Stip. ¶ 120; Tr. 1076-77, 1091-96; PX 307-309; Caldemeyer, Tr. *U.S. v. DI*, 1032-41; Conerly, Tr. *U.S. v. DI*, 2292-96, 2300-01, 2306-07; McDowell Dep. IV, 85-86, 89-91; McDowell Dep. VI, 9-10; McDowell Dep., *U.S. v. DI*, 113, 304-05, 307-12; Morgan Dep., Q1016-Q1018, Q1064-Q1067; Thomas, Tr. *U.S. v. DI*, 651-58.

processor, an alternative "committed supply" contract was developed.[55] These committed supply contracts were tantamount to full supply contracts with grandfather clauses because they committed the customer to purchase specified monthly quantities designed to maintain DI's position with the customer; any reduction in purchases from DI, unless accompanied by a pro rata reduction in purchases from other sources, would trigger a special charge which raised the handler's unit price and penalized him for increasing non-DI sources of supply during the year.[56]

Under the pressure of cutoff threats, Kinnett signed and renewed a committed supply contract because there was no practical alternative for the approximately 80% of its needs being supplied by DI.[57]

In 1973, when the eastern United States was experiencing a severe drought and milk production was decreasing,[58] DI unilaterally decided that the price escalator built into its contract was too low and demanded that all customers sign a wholly one-sided "supplemental agreement" which allowed DI to increase its prices further, yet provided absolutely no additional consideration to the processors.

When Kinnett would not agree to this change, DI proceeded with the price increase anyway and simply cut off Kinnett in derogation of the contract DI itself had designed.

Kinnett immediately instituted this litigation and was granted a temporary restraining order requiring DI to sell milk to Kinnett at the contractual formula price. Despite a most favored nations clause in its contracts, DI continued

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[55]Tr. 1099; PX 310; Caldemeyer, Tr. *U.S. v. DI*, 1047-49, 1052-56; McDowell Dep., *U.S. v. DI*, 296-98; Ortego Dep., Q198-200.

[56]Tr. 1103-12; PX 323, 391-394; Caldemeyer, Tr. *U.S. v. DI*, 1057, 1058; Conerly, Tr. *U.S. v. DI*, 2296-2306; McDowell Dep. I, 62-64, 79-80.

[57]Stip. ¶¶ 261, 300; Tr. 1129; PX 315, 394, 466. Kinnett was the last Georgia processor to sign a written sales agreement. Kinnett's contract, though it was signed in mid-January, 1972, was made effective as of October 1, 1971, Stip. ¶ 261.

[58]Stip. ¶ 262.

to charge all other customers the new, higher price.[59]

DI continued its strong-arm approach to maintaining customer allegiance in the following years. DI introduced new written supply contracts with a new freewheeling price term which allowed DI to increase prices during the year unilaterally and at will, on twenty-one days' notice, without reference to costs or to any external measure, while continuing to bind the buyer to purchase previously committed monthly volumes (or pay some form of penalty).[60]

Kinnett was not the first or the only processor to be repeatedly threatened or precipitously cutoff by DI. The records in this case and in *U.S. v. DI* are replete with similar dealings that bespeak DI's enormous power and its willingness to wield it to extract monopoly premiums.[61] Even corporations the size of Sealtest, Pet and Borden were dependent on DI for long periods of time.[62] Their attempts to replace portions of DI milk regularly met with the same response: if you dare to buy one more drop of non-DI milk,

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[59]Stip. ¶ 275, in early September, the Secretary of Agriculture ordered an immediate increase in Class I prices effective September 9, 1973, and Kinnett thereafter paid the price of $8.68/cwt. until September 30, 1973, when the contract expired. Stip. ¶¶ 276, 277.

[60]Stip. ¶¶ 280, 283, 285; Tr. 1157, 1160-65, 1747-52; PX 355, 356, 358, 359, 364, 369, 387, 445; McDowell Dep. V, 51, 55, 58; McDowell Dep., *U.S. v. DI*, 325-26, 328; Morgan Dep., Q669-Q670, Q715-Q717; Ortego Dep., Q114-Q117, Q364a-Q370a, Q483-Q487, Q489-Q490, Q495-Q497, Q502-Q503, Q505-Q516, Q518, Q709-Q712, Q714, Q800-Q801, Q816, Q819-Q821, Q944-Q948.

[61]*See* R. 1946-2223. DI's dealing with other processors are described in some detail in *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. ¶ 62,053 (W.D. Ky. 1978), *rev'd in part and remanded*, 1981-2 Trade Cas. ¶ 64,302 (6th Cir. 1981).

[62]The most significant case of such conduct for this action was DI's successful exclusion of the National Farmers Organization, a potential competitor, from the Georgia market, accomplished through a cutoff of the entire DI supply to Sealtest-Atlanta. R. 2206-15, 2214-15; Stip. ¶¶ 319-324; Tr. 1625-27, 1639, 1910-11, 1916-19; PX 297-301, 493; DX 82; Scott, Tr. *U.S. v. DI*, 833-39, 843-44; Thomas Tr. *U.S. v. DI*, 588-627; McDowell Dep. V, 155-60; McDowell Dep., *U.S. v. DI*, 46-47, 63-64, 84-103, 105-117, 119, 121-28, 130-39, 180-81; Ortego Dep., Q1606-Q1613.

we will cut you off competely.[63] It did not matter whether the volume of milk sought to be replaced was 40% (Broughton Dairies, Lexington, Kentucky), 33% (Sealtest-Chattanooga) or 1% (Sealtest-Nashville).[64] Indeed, throughout the period here involved, DI consistently sought to keep customers with the monopolistic vinegar of cutoffs rather than the competitive honey of the usual seller.[65]

II.
PROCEEDINGS BELOW.

On August 2, 1973, the day following DI's precipitous cutoff of its supply, Kinnett filed this action charging that DI and its predecessors, acting alone and in concert with other cooperative organizations, were attempting to monopolize and successfully were monopolizing the supply of raw Grade A milk in the Georgia marketing area.

The case was tried to the court in May and June 1980 before the Honorable William A. Bootle. On March 10, 1981, the court ruled that the challenged activities were within the scope of the antitrust immunity conferred by Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, and Section 6 of the Clayton Act, 15 U.S.C. § 17. The court also ruled that because DI's activities were not "predatory" in nature, it did not lose its Capper-Volstead immunity. Finally, assuming *arguendo* that DI's acts were "predatory," the court ruled that Kinnett had failed to establish a relevant market in which DI had the market power necessary to a finding of antitrust liability. 512 F. Supp. 608.

Appeal from the judgment was taken pursuant to 28 U.S.C. § 1291. Briefing was completed in January 1982 and oral

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[63]R. 2110-16, 2206-15; Tr. 2612-13, 2615; Brooking, Tr. *U.S. v. DI*, 516-22, 530 (from defendant's designations and counter designations from the record in *U.S. v. DI*.

[64]*Id.*

[65]R. 1956-63, 1965-72, 1985-2001, 2047-72, 2134-41; Stip. ¶¶ 325, 328; Tr. 1624-26, 1651-54; PX 305, 306; Caldemeyer, Tr. *U.S. v. DI*, 1032-41, 1047-49, 1052-56; Conerly, Tr. *U.S. v. DI*, 2292-96, 2300-01, 2306-07; McDowell Dep. IV, 85-86; Morgan Dep., Q1067.

argument was heard on November 1, 1982. Almost a year later, two members of the panel wrote a perfunctory affirmance from which Judge Morgan, endorsing the basic view that a cooperative is treated as a single entity, with competitive rights and responsibilities similar to those of a private business corporation, strongly dissented. 715 F.2d at 521.

III.
RELATED PROCEEDINGS.

At the time this action was tried to the district court, the United States had litigated and lost a similar suit in the Western District of Kentucky, *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. ¶ 62,053 (W.D. Ky. 1978), *rev'd*, 1981-2 Trade Cas. ¶ 64,302 (6th Cir. 1981) (Appendix D) (*U.S. v. DI*), *on remand*, 1983-2 Trade Cas. ¶ 65,651 (W.D. Ky. 1983) (Appendix E). That case involved some of the same conduct which is at issue here, specifically the "unilateral" conduct of DI in its heavy handed dealings with processors.[66] The district court decision in this case was very heavily influenced by the decision in the Western District of Kentucky, which the court quoted at extreme length on several key issues.

While this case was pending on appeal, that decision was reversed by the Sixth Circuit and remanded for further proceedings, principally because the district court's precepts on "predation" and relevant market, both of which Judge Bootle quoted at length and relied on, were found to be overly stringent. The Eleventh Circuit recognized the reversal of *U.S. v. DI* but nonetheless permitted the district court decision in this case to stand.

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[66]The inter-cooperative conduct challenged here was not at issue in the government case.

REASONS FOR GRANTING THE WRIT.

IV.

THE ELEVENTH CIRCUIT HAS, WITHOUT REAL ANALYSIS, DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW, WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

This petition seeks a legal affirmation that the limited immunity afforded to agricultural cooperatives by Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291 and Section 6 of the Clayton Act, 15 U.S.C. § 17, cannot be used to totally emasculate application of the antitrust laws to such cooperative business entities.

At the core of this case is a fundamental dispute regarding the proper role and rights of agricultural cooperatives which bears directly on the proper pricing of essential food items and which is, therefore, affected with a public interest. Resolution of this fundamental dispute involves meshing the general mandate of competition embodied in the antitrust laws, specifically the antimonopoly provisions of Section 2 of the Sherman Act, 15 U.S.C. § 2, with the limited exception to that mandate which has been granted to agricultural cooperatives by Section 1 of the Capper-Volstead Act, 7 U.S.C. § 1, and Section 6 of the Clayton Act. 15 U.S.C. § 17.

The Eleventh Circuit affirmance of the district court decision in this action is an affirmance of the view that the Capper-Volstead Act affirmatively contemplates and approves of cooperative monopolization by combination as well as by internal growth, with the result that the total elimination of competition by agreement among separate and distinct producer organizations cannot be considered "competition stifling" or predatory no matter how far ranging and no matter what effect on prices or available supplies. 512 F. Supp. at 631-32. The circuit court did not deign to discuss this view, but it is the fundamental premise of the district court decision against Kinnett. Kinnett's position is that the Capper-Volstead Act provides cooperatives with a qualified immunity which vests them, acting as entities, with

the same basic competitive rights *and* responsibilities available to corporations. That legislation, we submit, was intended to place farmers on an equal footing with business corporations and not to give them the right either to create monopolies or to engage in unfair practices in commerce. (Section V *infra*).

Accordingly, when DI's activities are viewed, as they should be, as an integrated course of conduct by a dominant producer cooperative which simultaneously is a major processor, the conclusion is irresistible that DI has violated the Sherman Act by an overwhelmingly anticompetitive pattern of preclusion that cannot be rationalized as part of the "legitimate objectives" of a cooperative protected by the Capper-Volstead exemption.

Since no prior case has involved anything like the far-reaching monopoly by combination involved in this case, this Court has not had occasion to decide which of these two views is correct.[67] A decision on this basic issue is, we submit, imperative.

The decision below effectively authorizes a group of individual cooperatives — each in and of itself a sprawling enterprise — to organize freely into a giant cartel and to corner the market for a basic agricultural commodity.

Indeed, the decision in this case stands for the proposition that agricultural cooperatives in general may, without fear of legal reprisal, join together and form cartels on a nationwide basis for the purpose of controlling the sale of *all* basic agricultural commodities.

The most recent National Commission for the Review of the Antitrust Laws (January, 1979) concluded:

> "Testimony before the Commission shows that the threat of monopoly by some cooperatives is now substantial. *In recent years there has been an ac-*

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[67]The Court denied certiorari in *Fairdale Farms v. Yankee Milk, Inc.*, 454 U.S. 818 (1981), which raised a question of cooperative monopolization in a much more limited situation.

> *celerating trend toward concentration in agricultural marketing. The Department of Agriculture predicts that in the future less than twenty cooperatives will control the nation's milk supply.* Today it is not uncommon for one cooperative to dominate the national production of a single fruit. Some staple crop cooperatives apparently would like to attain similar market control of their commodities.
>
> *"It is thus no longer argued that cooperative monopoly is impossible."*[68]

Thus, the danger of cooperative monopoly and the anticompetitive fallout from its unlawful maintenance is imminent. Moreover, as discussed in Section V below, it is a condition which Congress never meant to foster by the adoption of a limited immunity. That immunity was designed at a time when farmers were sadly being overpowered by corporate giants and was meant to foster healthy competition by equalizing bargaining power, *not* to substitute one unhealthy competitive situation for another.

Therefore, this case is not only of importance to Kinnett but to the roughly 1,000 independent dairy processors nationwide. This petition is supported by the National Independent Dairy Association, which is willing to file a brief *amicus curiae* should the Court so desire.

V.

THE COURTS IN THIS CASE HAVE DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW — THE SCOPE OF AN ANTITRUST IMMUNITY — IN A WAY THAT CONFLICTS WITH THE BASIC PRECEPTS ESTABLISHED BY THIS COURT.

Agricultural cooperatives are, and have always been, subject to the restrictions on business conduct imposed by Section 2 of the Sherman Act, and their actions vulnerable to

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[68] *Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures*, 259 (January, 1979) (footnotes omitted) (emphasis added).

challenge under it.[69] Neither the language of the Capper-Volstead Act, nor the legislative history preceding it, nor the judicial interpretations following it support the "rule," adopted by the court below, that cooperatives, unlike business corporations, have a special privilege to acquire and to maintain (or extend) monopoly power through willful conduct and combinations with others.[70]

To the contrary, the language of the immunity provision of the Capper-Volstead Act, by its own terms, simply authorizes the existence of farmer cooperatives, "corporate or otherwise, with or without capital stock," for "collectively processing, preparing for market, handling and marketing" their members' milk, and of "marketing agencies in common." 7 U.S.C. § 291. This language neither states nor implies that such associations or such agencies may organize a giant cartel; corner the market for a basic agricultural product; eliminate all competition between themselves by aligning prices, dividing territories and customers; extract full or committed supply contracts which lock processors into dependence on them; engage in cutoff threats, withholding actions and other measures which punish or discipline processors who try to resist the cartel; renege on contracts in order to force adherence to higher prices; or, in short, do *any* of the things which DI is charged with here. Like a corporate charter law, Section 1 simply says that cooperative and marketing associations may exist and operate to market and process their members' product.

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[69]*Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 466-68 (1960); *United States v. Borden*, 308 U.S. 188, 206 (1939); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 216 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 194 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 990 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *April v. National Cranberry Ass'n*, 168 F. Supp. 919, 923 (D. Mass. 1958).

[70]R. 3815-17; 512 F.2d at 630-31.

This Court itself has stated that the Capper-Volstead Act simply establishes cooperative "equal footing" with corporations and does not give them, as entities, any privilege to monopolize or restrain trade that corporations do not share. In *Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 464-65 (1960) ("*Maryland and Virginia*"), the Court described the purpose and recognized the critical legislative history of the Act as follows:

> "We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, *the same unified competitive advantage — and responsibility — available to businessmen acting through corporations as entities*. As the House Report on the Capper-Volstead Act said:
>
> > " *'Instead of granting a class privilege, it aims to equalize existing privileges by changeing the law applicable to the ordinary business corporations so the farmers can take advantage of it.'*[5]
>
> "This indicates a purpose to make it possible for farmers-producers to organize together, set association policy, fix prices at which their cooperative will sell their products and otherwise *carry on like a business corporation* without thereby violating the antitrust laws.
>
> [5]H.R. Rep. No. 24, 67th Cong., 1st Sess. 1."

Id. (emphasis added).

The Court also noted that:

> "The Solicitor of the Department of Agriculture testified that it was his opinion that *if the farmers want to create monopolies* or want to engage in unfair trade practices in commerce, *this bill certainly would not give them the right to do it*, and they would have to get another bill."

Id. n.16, quoting Hearings before a Subcommittee of the Senate Judiciary Committee on H.R. 2373, 67th Cong., 1st

Sess. at 203 (emphasis added).

Finally, the Court took particular note of the sweeping assurances given to Congress by the House Committee Report:

> "In the event that associations authorized by this bill shall do *anything* forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law."

Id., quoting H.R. Rep. No. 24, 67th Cong., 1st Sess. at 3 (emphasis added).

This statement, recognized and credited by this Court as one which "correctly interpreted the Capper-Volstead Act" (*id.*), could not be more clear or explicit.

The court below, without even analyzing the problem, effectively swept aside this basic precept of corporate-co-operative equivalence and discounted the decisions of this Court and lower courts implementing this precept,[71] largely on the authority of a recent Second Circuit decision which involved a claim of cooperative monopolization far more limited — in time, scope and effect — that that presented here.[72]

As Mr. Justice Holmes has said, ". . . the word 'right' is one of the most deceptive pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."[73] That is precisely what has happened here. The lower court has slipped from a qualified Congressional purpose to equalize cooperative and corporate bargaining strength to an unqualified conclusion that Congress tipped the scales so strongly in favor of cooperatives that they have an unparalleled "right" to monopolize.

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[71] *See* n. 69, *supra*.

[72] *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981), *on remand*, 715 F.2d 30 (2d Cir. 1983).

[73] *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350, 358 (1921).

This jump is an extraordinarily large one which clearly is not permitted by the controlling judicial authorities or the legislative history. The Capper-Volstead exemption, like other exemptions from the national economic policy embodied in the antitrust laws must be construed as narrowly as possible. *United States v. Borden*, 308 U.S. 188, 198-99 (1939); *Maryland and Virginia, supra*, 362 U.S. at 464-65. This means that the immunity is only as broad as is necessary to fulfill its intended purpose. Clearly, one need not grant farmers, or anyone else, a class privilege to monopolize and to dictate prices in order to equalize bargaining power. 362 U.S. 458, 465 (emphasis added)

Accordingly, it is wholly improper to read the Capper-Volstead Act, as did the court in this case, broadly, not narrowly, as affirmatively authorizing the willful acquisition of monopoly power, by combining indefinitely with farmers who are not in any way, shape or form part of the DI organization, with the express purpose and intent of jointly monopolizing the supply of milk over a broad geographic region as it did via the Georgia Super Pool, Great Lakes and ARSPC. The court here read the Capper-Volstead Act's provision authorizing cooperatives to operate "marketing agencies in common" (7 U.S.C. § 291), as giving DI carte blanche for all of the overlapping organizations in which it participated. This sweeping immunity is insupportable for the simple reason that it is in no sense necessary or even appropriate to the statutory goal of corporate-cooperative "equal footing" to allow coops to combine their forces indefinitely so as to totally stifle competition among themselves and from an outside source (*i.e.*, processing plants in the Upper Midwest) as well.

The three organizations involved here, which were expressly designed to, and which effectively did, cartelize a vast geographic area stretching from Canada to the Gulf of Mexico, are a far cry from the sort of marketing agent in common envisioned by the framers of the Capper-Volstead Act. The prototype they had in mind in authorizing the

formation of such agents was the joint ownership and operation of facilities like grain elevators. H.R. Rep. No. 24, 67th Cong., 1st Sess. 2 (1921).[74]

Therefore, it is readily apparent that the "marketing agent in common" provision, like the basic authorization for the formation of cooperatives, was intended to do nothing more than place cooperatives on an equal footing with corporations. Thus, one may liken a legitimate marketing agent in common to a corporate joint venture. Oil companies, for example, can join together to develop an oil field that would be impractical for any of them acting alone. But there is no doubt that they cannot lawfully form an OPEC-like cartel to dry up surpluses and eliminate all meaningful competition. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). There should also be no real doubt that agricultural cooperatives cannot under the guise of "common marketing agencies" organize such a beast.

Antitrust law recognizes that the practical limitations on internal growth operate as a natural check on unwanted and undeserved accretions of power. Accordingly, antitrust case law routinely distinguishes monopolies achieved through internal growth from those achieved by merger or combination with others. *See United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966). There is absolutely no reason why that traditional distinction should be thrown aside simply because the defendant operates with a cooperative rather than a corporate form of organization. The difference between (1) DI recruiting all of the farmer-members of all of the other cooperatives with whom it collaborated and (2) DI obtaining the cooperation of all of those members in eliminating competition by agreement is not at all a matter

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[74]In explaining the "marketing agencies in common" clause, Congressman Volstead emphasized its limitations:

> "We are merely seeking to give [cooperatives] a status that will make it possible for them to organize and to cooperate with other organizations similarly organized *to the extent that may be necessary to meet industrial conditions.*"

61 Cong. Rec. 1033 (1921) (emphasis added).

of *de minimis* organizational distinctions. Nor is this a case where DI merely entered a limited joint venture of the type envisioned by the framers of the Capper-Volstead Act when they authorized "marketing agents in common." Here, the elimination of competition by agreement was so *far-ranging* in terms of the number of participants, geographic scope and the amount of milk involved that there is no question that DI could never have realistically expected to do the same thing via internal growth. The very crux of the problem here is that DI got rid of competition, *which it could not eliminate through internal growth*, by agreement.

Antitrust law also recognizes that conduct which is innocuous when undertaken by a small firm may be anticompetitive when undertaken by a larger one[75] and there is no reason why that principle should be thrown aside, as it has been here, simply because the defendant operates as a cooperative rather than a conventional business corporation. DI piled successive layers of competition-stifling, inter-cooperative agreements one upon another in ever-widening circles. At the most basic level, that of the Georgia Super Pool, DI's arrangements were expressly designed not only to eliminate competition among the cooperative participants in the sale of surplus raw milk but also to reduce, if not eliminate, competition at retail in the sale of *processed milk*.[76] At the middle level, DI's arrangements were characterized by an agreement with other members of the Great Lakes Federation to allocate territories and to align prices in a way that would discourage competitive movements

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[75]*Hunt Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 100 S.Ct. 1061 (1980); *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881, 887 (9th Cir. 1979); *cf. Mid-Texas Communications v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1387-89 (5th Cir. 1980).

[76]Tr. 144-49, 151-54, 650-54, 1548-50, 2002-11; Davenport Dep. I, 35; McDowell Dep. V, 203-04; PX 21, 40, 477, 485, 487, 488.

across members' marketing territories.[77] At the broadest level, DI's inter-cooperative arrangements consisted of a Standby Pool scheme whereby southern and midwestern cooperatives agreed not simply to eliminate competition among themselves but more importantly to stop the southward flow of other milk — *milk which they could not control through their natural and legitimate control over their own members' milk* — by paying unregulated processing plants in the M-W area substantial sums of money to keep their milk at home except when the Standby Pool itself wanted the milk.[78]

Moreover, DI simultaneously undertook to lock customers into continued dependence on it via a series of contractual provisions and actual and threatened cutoffs which in the related government case have been held to demonstrate DI's specific intent to monopolize. Customers such as Kinnett were forced by necessity to adhere to supply contracts with their assigned supplier and were effectively precluded from readily developing additional alternate or cheaper sources of supply and were punished for even attempting to do so.[79]

In short, in this case defendant's market conduct reflects a calculated attempt to manipulate the surplus supply of a basic agricultural commodity in order to effect total control of regular supplies. This purpose is not legitimate, but rather

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[77]Stip. ¶¶ 161, 166-171, 173-176, 180-184; Tr. 158-59, 161-64, 654-57; PX 59, 70, 81, 97; Buckley Dep., Q240-Q253, Q293-Q294, Q306-Q307, Q424-Q427; Lake Dep. I, 17-18, 22-27; Lake Dep. II, 97-98; Morgan Dep., Q579-Q582; Ortego Dep., Q1160-Q1188, Q1531-Q1538, Q1606-Q1613.

[78]Stip. ¶¶ 185, 190-192, 202-207, 214, 215; Tr. 164-65, 183-84, 190-99, 211-19, 530-31, 533-39, 658-62; PX 56, 81, 114-116, 122, 123, 124, 133, 171, 172, 199, 213, 220-24, 481.

[79]Stip. ¶¶ 253, 254, 262-277, 345; Tr. 1103-12, 1876-83; PX 323, 391-394; McDowell Dep. I, 62-64, 79-80; Caldemeyer, Tr. *U.S. v. DI*, 1057-58; Conerly, Tr. *U.S. v. DI*, 2296-2306.

is illegal control traditionally condemned when undertaken by noncooperatives.[80]

VI.

THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE SIXTH CIRCUIT IN ESSENTIALLY THE SAME MATTER.

On two crucial points, the decision of the court below, affirming the Middle District of Georgia, is flatly inconsistent with the decision of the Sixth Circuit and the Western District of Kentucky in *U.S. v. DI*.

The first of these points is the need to prove predation. Judge Allen in *U.S. v. DI* initially held that the Capper-Volstead Act "exempt[s] agricultural cooperatives from liability for attempts to monopolize unless their anticompetitive conduct is deemed 'predatory.' " 660 F.2d at 194. The Sixth Circuit held that this was clear error and remanded the case for further consideration of "whether there were less exclusionary methods in which DI could achieve its legitimate goals and "whether these [full and committed supply] contracts [of DI] were intended to stifle competition or were intended to meet legitimate business purposes." On remand, the district court found that these contracts — the very ones upheld as lawful in our case — were intended to stifle competition and established DI's specific intent to monopolize.

In the present case, the district judge, like Judge Allen, clearly required plaintiff to prove "predation." Even a cur-

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[80] *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 & n.59 (1940) (price tampering *via* control of supply through elimination of surplus); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 240-42 (1899) (market division *via* joint ventures); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972) (customer allocation *via* common purchasing agent); *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 210 & n.5 (1979) (elimination of competition *via* otherwise lawful contracts); *Maryland and Virginia Milk Producers v. United States*, 362 U.S. 458, 472 (1960) (same); *Simpson v. Union Oil Company of California*, 377 U.S. 13 (1964) (suppression of competition and disciplining of customers *via* termination of otherwise lawful contracts).

sory review of the opinion reveals that the subsequently reversed district court decision in *U.S. v. DI* was virtually the only authority cited by the court below to support its findings regarding the character of DI's conduct. 512 F. Supp. at 635-37. Moreover, the *U.S. v. DI* case was not merely cited on this point, it was quoted at extraordinary length. *Id.* Indeed, it is fair to say that the court's entire analysis of DI's disputes with handlers was lifted verbatim from the district court opinion in *U.S. v. DI. Id.*

The Eleventh Circuit attempts to rationalize away the district court's obvious use of Judge Allen's erroneous standards and Judge Allen's erroneous findings by noting that "the district court specifically held that D.I. had 'no conscious intent to stifle or smother competition. . . .' [and] . . . used the term 'predatory in its broadest sense' " — whatever that means. But as the dissent aptly notes, this is really beside the point because the district court erred in requiring Kinnett to prove any predatory conduct. "The fact that a business practice is not predatory does not eliminate the possibility of an unlawful intent." 715 F.2d at 522, citing *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1183 (8th Cir. 1982), *accord, U.S. v. DI*, 660 F.2d at 194-95.

Moreover the Eleventh Circuit's attempt to justify the district court opinion elevates verbiage over substance. Whatever the buzz words the district court used in its opinion, the deficiencies in its actual analysis remain. To begin with, the district court here never even considered whether "there were less exclusionary methods in which DI could achieve its legitimate goals" as required by the Sixth Circuit. 660 F.2d at 192. Second, the district court never evaluated DI's conduct in the context of its dual status as a dominant supplier to and principal competitor of the plaintiff.

In addition, the district court's analysis of intent, which the Sixth Circuit found to be of critical importance to an evaluation of the legitimate or illegitimate character of DI's conduct (1981-2 Trade Cas. ¶ 64,302 at 74,370) was, in

our case, derailed early on by the district court's findings that DI's activities were all within the ambit of Capper-Volstead protection and that DI had no monopoly power in a broadly defined relevant market. 512 F. Supp. 631-41.[81]

The upshot of the Eleventh Circuit's attempts to gloss over these deficiencies is just what one would expect — a glaring inconsistency in which Kinnett is stuck with a ruling that DI's dealings with processors, particularly the full and committed supply contracts, are entirely legitimate, whereas in *U.S. v. DI the very same conduct* has been held to constitute anticompetitive conduct establishing a specific intent to monopolize.

The same inconsistent and unjust result occurs with respect to the definition of a relevant geographic market. Kinnett is stuck with a ruling rejecting any definition based on federal marketing order areas, whereas the government claims have been evaluated in terms of a submarket specifically defined in terms of such areas. Indeed, Kinnett is stuck with a ruling rejecting a submarket definition even

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[81]The district court's finding on specific intent, which the Eleventh Circuit invokes as a justification for affirmance, is completely nonsensical and self-contradicting. At page 639 of its opinion, the district court, having found DI entirely immune under the Capper-Volstead Act, stated that it was going beyond its basic findings to "see what the result would be if we found that the complained of conduct was predatory, in violation of the Sherman Act, in which event DI may be said to have lost the [Capper-Volstead] exemption." 512 F. Supp. at 639. Then the court went on to say that there was no evidence of specific intent. *Id.* at 641-42. But if the conduct "was predatory" that itself is all the evidence of specific intent one ever needs. *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir.), *cert. denied*, 434 U.S. 879 (1977). Hence, the court's analysis is totally at odds with its professed *arguendo* assumption that the complained of conduct was predatory. Thus, it is clear that in this second phase of its opinion, the court's pronouncements were being dictated by its own previously adopted view that the complained of conduct was legitimate cooperative conduct, *i.e.*, protected by the Capper-Volstead exemption.

broader than the one finally adopted in *U.S. v. DI*.[82]

Here again the Eleventh Circuit's suggestion that the district judge really had an independent reason for rejecting Kinnett's submarket is unrealistic and does not in any event justify the inconsistent and unjust results which it produces. The district court below applied Judge Allen's analysis, *factual* as well as legal, as if it were *res judicata*. It is true that the district court, after citing the general test of *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961), went through the exercise of rejecting Kinnett's proposed relevant geographic markets. But, in applying the general standard enumerated in *Tampa Electric*, the court here, following the pattern established by the district court in *U.S. v. DI*, was totally ignoring *all* of the case law which fleshes out the general standard and which indicates that there may be relevant submarkets smaller than the total area in which a seller operates.[83]

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[82]One of the submarkets proposed by Kinnett was the nine federal order areas within DI's total marketing territory. The submarket defined by Judge Allen on remand consists of five of those order areas including Georgia. Using this definition, Judge Allen found that while the government had proved DI's "specific intent" to monopolize, it "failed by a narrow margin" to meet its burden of proof with reference to the probability of success factor. Our case contains substantial additional evidence on DI's actual market power in federal order areas (lawfully acquired or not) which was not considered in *U.S. v. DI* which cure the defects in the government's proof and which, we submit, would more than eliminate that "narrow margin." For example, DI's role as selling agent for the Georgia Super Pool, lawful or not, clearly gives it more power than a simple calculation of its own share of the milk produced in Georgia (the measure used in *U.S. v. DI*) would indicate.

[83]Specifically, the court ignored *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959) (which was quoted in the Sixth Circuit reversal), and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948), and *United States v. Empire Gas Corp.*, 357 F.2d 296 (8th Cir. 1976) (both of which are cited in Judge Allen's opinion on remand). These and other and local market cases were cited by Kinnett in both pre- and post-trial briefs. The district court, however, did not mention them and did not even give lip service to the established principle that the Sherman Act applies to "localized geographic areas." *International Boxing Club, supra*, 358 U.S. at 251, quoted in *U.S. v. DI*, 660 F.2d at 195.

Thus, the court's exercise was a hollow gesture with a foregone conclusion. The simple and substantive facts are that the court below was following a case which erroneously said there can be no local submarkets, and there are none in DI's territory. That very case now establishes, contrariwise, that there are.

Conclusion.

For the reasons stated above, this Honorable Court should grant the Petition for Writ of Certiorari sought herein.

DATED: December 19, 1983.

Respectfully submitted,

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APPENDIX

APPENDIX A.

KINNETT DAIRIES, INC., Plaintiff-Appellant, v. DAIRYMEN, INC., Defendant-Appellee. No. 81-7308.

United States Court of Appeals, Eleventh Circuit.

Sept. 19, 1983.

Dairy processor brought civil antitrust action against non-profit agricultural milk marketing association qualifying as Capper-Volstead Act marketing association. The United States District Court for the Middle District of Georgia, William A. Bootle, Senior District Judge, 512 F.Supp. 608, entered judgment for marketing association, and dairy processor appealed. The Court of Appeals held that: (1) district court did not use overly stringent test of predation and did not fail to focus on association's intent to smother competition, and (2) district court's determination did not fail to consider relevant submarkets.

Affirmed.

Lewis R. Morgan, Senior Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The facts of this case are reported in detail in the excellent district court opinion of Judge Bootle. *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F.Supp. 608 (M.D.Ga. 1981). We affirm that opinion. Appellant Kinnett Dairies raises on appeal only two arguments worthy of discussion. Both arguments are based on *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981), which involved the same defendant present in this case and similar contentions of antitrust

violations. In that case the Court of Appeals for the Sixth Circuit reversed the district court on two grounds, both of which Kinnett urges as grounds for reversal here.

The Sixth Circuit's first ground for reversal was that the district court used an overly stringent test of predation to evaluate the conduct of Dairymen, Inc. (D.I.). The court rejected this test, and remanded the case to the district court to determine whether D.I. possessed an intent to smother competition. Kinnett argues that the district court in this case also used an overly stringent test of predation and did not focus on Dairymen's intent. To the contrary, the district court specifically held that D.I. had "no conscious intent to stifle or smother competition . . . ." *Id.* at 643. Moreover, the district court throughout its opinion used the term "predatory" in its broadest sense. *E.g.*, 512 F.Supp. at 633 (certain activities "not predatory in any sense of the word"). Thus, Kinnett's reliance on *United States v. Dairymen, Inc.*, in support of its first ground for reversal is misplaced.

The Sixth Circuit remanded also for the district court to determine "relevant geographic submarkets on the basis of commercially significant areas in which D.I. operated and in which D.I.'s customers could turn to other suppliers." This is the test set forth in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961), which case the Sixth Circuit cited. 660 F.2d at 192. Kinnett argues that we should remand in this case because as in the Sixth Circuit case, the district court failed to consider relevant submarkets. It is true that the district court rejected Kinnett's proposed submarkets, and that as an *additional reason* for such rejection quoted from now-reversed language of the district court in *United States v. Dairymen, Inc.* However, the court's major and independent reason for rejecting Kinnett's submarket arguments was the failure of the proposed submarkets to coincide even closely

with those resulting from the court's application of the *Tampa Electric* test, the very test the Sixth Circuit ordered the district court in that case to apply. The district court in this case having applied the *Tampa Electric* test, it would of course serve no purpose to remand for application of that test. Thus, we reject Kinnett's second argument.

Finding no merit in any of Kinnett's arguments on appeal, we affirm.

AFFIRMED.

LEWIS R. MORGAN, Senior Circuit Judge, dissenting.

I respectfully dissent. The district court plainly held that the Capper-Volstead Act, 7 U.S.C. § 291, grants full immunity from section 2 of the Sherman Act, 15 U.S.C. § 2, to a dairy cooperative unless it engages in predatory conduct. *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F.Supp. 608 (M.D.Ga. 1981). Although a precise definition of "predatory" was never articulated in his opinion, the district judge held Kinnett Dairies to a higher standard of proof than a non-agricultural business organization would have faced in a similar antitrust action. The majority now affirms the district court's use of this standard and avoids any detailed examination of the issue by reasoning that the district court "used the term 'predatory' in its broadest sense." Slip op. at 4879, ___ F.2d at ___ I believe the district court erred by requiring Kinnett Dairies to prove *any* predatory conduct in support of its claims of monopolization and attempt to monopolize under section 2 of the Sherman Act.

The immunization granted to agricultural cooperatives by the Capper-Volstead Act extends only to association and combination activities of agricultural producers. A cooperative is treated as a single entity, not as an association of competitors. In other words, "an agricultural cooperative can wilfully attain a monopoly through the voluntary enrollment of its members, or through a voluntary combination with other cooperatives." *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982). On the other hand, the competitive activities of the cooperative entity are not immunized. "[F]armers may act together in a cooperative association, and the *legitimate objects* of mutual help may be carried out by the association without contravening the antitrust laws, but . . . otherwise, the as-

sociation acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation." *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966). Thus, the district court erred in concluding that Dairymen, Inc., as an agricultural cooperative, is immunized from section 2 liability absent a showing of predatory conduct.

As an alternative basis for his decision, the district judge considered the various claims of Kinnett Dairies as if Capper-Volstead immunity was not applicable. He concluded that Dairymen, Inc., did not monopolize or attempt to monopolize as alleged in the complaint. While this conclusion would normally provide an independent basis for affirmance, I believe the case should be remanded for more detailed findings under this same analysis. The district judge relied heavily on the findings and decision in *United States v. Dairymen, Inc.*, Trade Reg.Rep. ¶ 62,053 (W.D. Ky. 1978), and that case has since been reversed by the Sixth Circuit. *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981). Moreover, the district judge summarily concluded that there was no evidence of specific intent which is necessary to establish a claim of attempt to monopolize. I would hold this conclusion to be plain error based on the evidence and factual conclusions cited in the district court's opinion as it presently reads. The fact that a business practice is not predatory does not eliminate the possibility of an unlawful intent. *Alexander v. National Farmers Organization*, 687 F.2d at 1183. For these reasons, I would vacate and remand the lower court's opinion.

APPENDIX B.

In the United States District Court for the Middle District of Georgia, Columbus Division.

Kinnett Dairies, Inc., Plaintiff, v. Dairymen, Inc., Defendant. Civil Action No. 1701.

Filed at 10:35 A.M., Mar. 10, 1981.

BOOTLE, Senior District Judge:

I.
GENERAL BACKGROUND

This is a civil antitrust action for treble damages and injunctive relief under the antitrust laws. The plaintiff, a dairy processor, is a Georgia corporation with its principal place of business in Columbus, Georgia. The defendant is a milk marketing association with its principal place of business in Louisville, Kentucky. This court has jurisdiction over the subject-matter and parties, and venue is properly laid in the Middle District of Georgia.

This action was commenced in August 1973 and was tried to the court without a jury in May and June of 1980. The trial itself lasted three weeks and resulted in a transcript in excess of 2,800 pages, plus uncounted pages of exhibits and depositions and transcript of testimony from trials of other cases. Originally, the plaintiff alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2 (Supp. 1980)), Sections 2 and 3 of the Clayton Act (15 U.S.C. §§ 13 and 14 (1973)), Section 4 of the Agricultural Fair Practices Act of 1967 (7 U.S.C. § 2303 (1973)), and breach of contract. By time of trial, however, the scope of the complaint had narrowed considerably, the plaintiff charging only violations of Section 1 and 2 of the Sherman

Act.[1] The plaintiff charges that the defendant, acting alone and in concert with other milk producers, and other milk marketing associations, attempted to and did successfully restrain trade and commerce in and monopolize the supply of raw Grade A milk. The plaintiff complains that the defendant entered into a series of anticompetitive arrangements with other cooperatives with the purpose and effect of obtaining or maintaining monopoly power, and undertook specific predatory acts against dairy processors, including the plaintiff. The defendant's response to these charges is twofold. The defendant first contends that its conduct amounted to legitimate marketing behavior which did not violate the proscriptions of the Sherman Act. The defendant also contends that even if its behavior might ordinarily be in violation of Sections 1 and/or 2, nevertheless, as an agricultural cooperative, it is entitled to the benefit of the antitrust exemptions provided by Section 6 of the Clayton Act (15 U.S.C. § 17 (1973))[2] and the Capper-Volstead Act (7 U.S.C.

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[1]Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

[2]"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

§ 291 (1980))[3] (hereafter referred to collectively as the Capper Volstead Act or the C-V Act).

The facts involved here do not lend themselves to a simple recitation. The case bristles with a multitude of intertwined issues. Because of this, it is extremely difficult to "compress them into an opinion that will not be of fatiguing prolixity."[4] To resolve the issues involved, it is necessary to have a knowledge of the parties to this action and to analyze each activity of the defendant which serves as the basis of the plaintiff's charges. Accordingly, this memorandum opinion is intended to suffice as findings of fact and conclusions of law under Rule 52, Federal Rules of Civil Procedure,[4a] and its form is as follows:

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[3] "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therin, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

[4] *United States v. United States Steel Corp.*, 251 U.S. 417, 437 (1920).

[4a] Each statement herein, to the extent that it purports to be factual, is intended as a finding of fact, and to the extent that it is expressive of a legal opinion or conclusion of law, is intended as a conclusion of law.

II
THE PARTIES

A. *The Plaintiff.* The plaintiff, Kinnett Dairies, Inc. (Kinnett) is a closely held Georgia corporation with its principal place of business in Columbus, Georgia. Kinnett is primarily engaged in the processing of Grade A milk for fluid consumption. To a lesser extent, it is also in the business of manufacturing ice cream.

B. *The Defendant.*

(1) *Formation and Structure*

Dairymen, Incorporated (D.I.) is a nonprofit agricultural milk marketing association organized and existing under the laws of the state of Kentucky and qualifying as a Capper-Volstead marketing association. D.I. was formed in 1968 as a combination of and successor in interest to eight cooperatives located throughout the southeastern United States. Today, D.I. has ten separate divisions serving this area. These geographically distinct operating divisions are responsible for the day-to-day marketing operations carried on by the cooperative, including quality control, hauling arrangements with proprietary handler customers assigned to the division, and resolution of handler and/or producer complaints.

The membership of D.I. consists solely of dairy farmers (''producers'') who produce raw milk to be marketed for commercial use in dairy products. Each D.I. member signs a Membership Marketing Agreement which gives D.I. authority, *inter alia*, to market the member's milk. Since its formation, D.I. has had a board of directors elected under a delegate system from among its members. This board sets the policies and has final authority over all major decisions which may affect the cooperative as a whole.

(2) *Functions*

Some of the reasons the defendant offers for its existence are:

(a) to give producers more representation in the marketplace;

(b) to ensure that producers obtain a fair, secure, and guaranteed market for their product;

(c) to provide its members some countervailing power with which to bargain with processors for prices above the federal order minimum price and more reflective of market conditions;

(d) to provide members with improved and more efficient assembly and distribution of milk; and

(e) to accomplish more easily by consolidated effort the intermarket alignment of raw milk prices.

Perhaps the best "nutshell" statement of the function of D.I., and of marketing cooperatives in general, is that they exist to provide their members with the best return possible for their product. Raw milk can be utilized in one of two ways. It can be used for fluid consumption (Class I utilization) or it can be used for making certain "manufactured products" like butter, cheese, or ice cream (Class II and III utilization). A dairy farmer can get more money for his milk if the processor uses it for "fluid" purposes. Consequently, these farmer producers desire that as much of their milk as possible obtain a Class I utilization. Cooperatives like D.I. exist to help the producers obtain this goal. Of course, the producer would also like to avoid having to dump his surplus milk (milk in excess of the fluid milk needs of processors) down the drain. The cooperative aids the producer in this respect by finding Class II and Class III markets for the surplus milk.

III
ACTIVITIES OF DEFENDANT

The plaintiff contends that the defendant engaged in a course of conduct designed to obtain and maintain the power to control prices and exclude competition in the supply of raw milk in the Georgia marketing area, and that this conduct exceeded any legitimate functions of a cooperative bargaining for the sale of its members' milk. The conduct complained of can be divided into two categories: D.I.'s involvement with other marketing associations (joint activity), and its individual conduct toward Kinnett and other dairy processors (unilateral activities).

A. *Joint Activities*

In its most recent brief (Plaintiff's Reply to Defendant's Post Trial Brief) the plaintiff contends that the following listed incidents of joint activity by the defendant evidence a scheme of cooperative monopolization which includes predatory conduct and that such conduct is neither legitimate nor immune from suit.

The defendant, on the other hand, contends that all this activity is a part of the "legitimate objects" of a Capper-Volstead (C-V) organization and is a part of the conduct of "processing, preparing for market, handling and marketing . . . and hav[ing] marketing agencies in common . . . [and] mak[ing] the necessary contracts and agreements to effect such purposes."[5]

(1) *The Georgia Super Pool*

The Georgia Super Pool is a group of C-V cooperatives in Georgia which appoints one of its number to serve as the marketing agent for the members. D.I. has been this com-

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[5]7 U.S.C. § 291.

mon marketing agent since 1970. The pool has two main functions: disposal of the surplus milk of its members; i.e., milk not needed by the members for their own processing plants,[6] and establishing a formula for distribution of milk payments received which are in excess of the federal order minimum price for the FMO-7 order.[7]

The plaintiff contends that both functions of the Super Pool operate to neutralize competition among the cooperatives in Georgia and to give D.I. effective control over the outside disposition of the bulk of locally produced milk. It contends that, since 1969, substantial amounts of surplus milk have been produced by the Super Pool members and, that in the absence of the Super Pool, these members would have been willing and able to sell surplus milk to Kinnett. The defendant's response is that without the Super Pool, members would have had to make "distress" sales at prices below the cost of production in order to get rid of their surplus milk. It contends that the formula for distributing premiums among its member cooperatives does *not* stifle competition, but rather, provides for an equitable distribution which serves as an attempt to avoid retail price wars which had been so harmful to Georgia dairy farmers in the past. It contends further that the Capper-Volstead Act not only permits but encourages agreements among cooperatives to dispense with competition among themselves.

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[6]Cooperatives are of two types: a "*bargaining*" co-op is strictly concerned with the marketing of its members' milk, and maintains no processing facilities, i.e., dairies. An "*operating*" co-op does own processing facilities and, to the extent it desires, processes its members' raw milk in its *own* facilities. All the members of the Super Pool except D.I. are "*operating*" co-ops.

[7]FMO-7 is the Federal Milk Marketing Order for the Georgia area. It was promulgated by the U.S.D.A. and established, *inter alia*, a minimum price which all handlers regulated by that Order (like Kinnett) must pay to Georgia producers for their milk. Any price asked for by the producers which is in excess of this federal order minimum price is an "over-order" amount or "premium."

(2) *Great Lakes-Southern Milk, Inc.*

Great Lakes-Southern Milk, Inc. (GLSM) is a federation of dairy cooperatives covering a geographic area more or less reflected by its name. D.I. has been a member of GLSM since October 1968.

The stated goal of GLSM at its formation was to put an end to processors "playing one market or one cooperative against another" in order to bring down the raw milk prices. Its functions include: improving the prices of the dairy farmer members of the member cooperatives, attempting to assure that the prices in the various markets served by member cooperatives are in alignment, providing a forum for discussion of Class I prices and alignment, and making recommendations for Class I pricing and price alignments.

Kinnett charges that the federation effectively eliminates competition in the sale of raw milk and confers upon its members the power to control prices throughout the designated market served by each member. It complains that D.I., and the other member cooperatives of GLSM, coordinated their pricing changes and that this alignment eliminated the obstacle associated with raising Class I prices — the failure of cooperatives in neighboring markets to raise their prices as well. D.I. counters that GLSM is a necessary organization by which producers can meet processors on equal terms; that its marketing information and pricing recommendations aid in establishing an orderly market; i.e., one in which there is an economic movement of milk and the existence of a general understanding of what all markets are doing; and that because of milk's perishability, this marketing information is necessary to facilitate decisions by members concerning supply, volume, alternate sources, where to dispose of excess, and other marketing needs.

(3) *The Standby Pool*

The Standby Pool (ARSPC) is a federated agricultural cooperative whose members are Capper-Volstead cooperative associations. It performs two related operations: the establishing of a "reserve supply" of milk by purchasing "options" on unregulated milk in the upper Midwest and, the purchasing and sale of milk from that reserve supply. It is possible to establish a reserve supply because of the chronic surplus of Grade A milk which exists in the upper Midwest area, primarily in Minnesota and Wisconsin. What ARSPC does is purchase "options" on much of this surplus Minnesota and Wisconsin milk. This option requires participating manufacturing plants in those areas to hold this surplus milk for a certain length of time before using it for their own purposes.[8] If ARSPC does call on the milk for use in a market to the South, they will pay for the milk itself.[9] This payment would be *in addition to* the option payment.[10] If ARSPC has not exercised its option on the milk within the specified time, then the manufacturing plant

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[8]To qualify for the option payments, a manufacturing plant had to meet certain requirements. Among other things, it had to have a Grade A rating and had to have a minimum of 50,000 lbs. per day. In addition, the plants were required to own manufacturing facilities capable of processing their milk.

[9]Before the Minnesota-Wisconsin area became pooled on a Federal Order (June 1, 1976), ARSPC would pay the participating plants an amount for the milk equal to what the manufacturing plant could get for it from the nearest federal order.

[10]The mechanics of the option payments work as follows: Each member cooperative of the Standby Pool would pay into a fund a reserve pool "assessment", based upon that cooperative's total Class I sales. The monies in the fund were then distributed to unregulated milk manufacturing plants in the Minnesota-Wisconsin (M-W) area based upon a formula designed to provide the plants (and the producers serving them) with a return about equal to what they would have received as pool plants under the nearby federal order.

is free to use it in any way it wishes."[11] For the purposes of this case, these manufacturing plants were all owned by farmer cooperatives. (Tr. 204, 207-208; Stip. ¶ 217).

The plaintiff contends that ARSPC operates as a device by which cooperatives in the South can obtain control over the Minnesota-Wisconsin supply of unregulated surplus milk

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[11]It should be noted that the terms of the contracts between the participating plants granting the options and the Standby Pool changed several times between 1970 and 1976. The 1970 contracts gave the Standby Pool a right of first refusal on the milk for a period beginning "at least 24 hours prior to . . . time of farm pick up" and continuing until 12 hours after receipt of the raw milk at the receiving facilities. It also provided that "in the event Associated Reserve Pool does not exercise its option, the supplier may use or commit for use any of its Grade A milk supply for production of manufactured milk products, but will not accept any offer from or make a sale to, another purchaser of milk for other than manufacturing use without giving notice to Associated Reserve Pool of its intent to sell such milk and afford Associated Reserve Pool its right of first call on such milk."

The 1971 contract retained the time period in which the Pool could exercise its option; i.e., from 24 hours before pick-up to 12 hours after receipt at the plant. However, the requirement that the supplier only use milk, not called on by the Pool, for manufacturing purposes unless first notifying the Pool was not included in the 1971 or subsequent contracts.

By 1973, both provisions had been changed: The Pool could exercise its option by telephone notification "at least 24 hours prior to the approximate time of shipment" and milk on which the option was not exercised was "free of any marketing rights of ARSPC."

In 1976, yet another modification occurred, the time for exercising the option being "at least 24 hours prior to the time of farm pick-up", and the reference to milk on which the option was not exercised allowing the supplier to retain it "for such use or disposition as it shall determine."

There is some question as to whether or not some of these changes were required, or at least encouraged, by certain consent decrees entered in *United States v. Associated Milk Producers, Inc.* 394 F.Supp. 29 (1975) and *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. ¶ 61,509. The *AMPI* consent decree was entered on April 30, 1975; however, the antitrust case leading to the decree was initially filed on Feb. 1, 1972. The *Mid-America* action commenced on Dec. 27, 1973 and the decree was entered on May 17, 1977. It is admitted that at least the 1976 change — "for such use . . . as it shall determine" — was placed there because of the *AMPI* consent decree (Smith Dep. at p. 271). And it is reasonable to assume that, at least after the initial (1971) contract change, the *AMPI* and *Mid-America* cases had some influence on the terms of the Standby Pool contracts.

to keep it from being sold in markets to the South in competition with those cooperatives. In the absence of the Standby Pool, Kinnett argues, this great surplus of Midwest milk would be attracted to southern markets because of the premium prices for milk there, and that through ARSPC, southern cooperatives like D.I. paid[12] producers in the high production states to keep and process their milk in that area and not to sell it in markets to the South in competition with these cooperatives, i.e., they protected premium prices by keeping milk off the market.

The defendant contends and the court finds that there is a need to maintain a reserve supply of milk. Supply and demand in the southern milk markets are cyclical; i.e., there are times of peak and times of low supply and demand. Unfortunately, when the supply of milk for the market is lowest, the demand tends to be the highest, and vice versa. In these "short seasons", when total milk supply is less than or equal to the fluid milk demand, the chronic surplus of Grade A milk in the upper Midwest can provide the needed reserve supply for the southern states. Membership in ARSPC would be beneficial because it would provide the means for obtaining dependable supplemental Grade A milk supplies at reasonable predetermined prices, thus eliminating the need to develop and maintain costly year-round local reserves. For ARSPC members, payments made to fund the option payments to the supply plants were like insurance payments to have milk available when needed.

The defendant denies that the Standby Pool was intended to prevent Kinnett or anyone else from obtaining supplemental milk. As support, it notes that from the Standby Pool's inception there have been at least eight billion pounds

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[12]The defendant does not presently belong to ARSPC. Its membership was from 1970 to 1978.

of Grade A milk in Minnesota and Wisconsin annually on which the pool has no options, which was not used for local fluid sales, and which could have moved freely to Kinnett. The pool's options have rarely exceeded approximately 1.6 billion pounds of milk annually. The plaintiff's response to this is that although ARSPC's options on the total amount of Grade A milk in the M-W area were relatively small, it did have options on the bulk of the *unregulated* milk in the area. The significance of this, according to the plaintiff, is that it is this unregulated milk which is most likely to be attracted to the southern markets.

The plaintiff also contends that the amounts of milk under contract with the Standby Pool greatly exceeded the total needs of its members for reserve supplies. The plaintiff points out that, even in the fall of 1973 when there was supposedly an "emergency" shortage condition, only 39.6 percent of milk committed to ARSPC was shipped in any one month, and never in the Standby Pool's history up to 1976 did amounts shipped exceed 11.1 percent of the yearly amounts under option. The defendant, of course, disagrees with this assessment and points out that there have been times when the amounts of milk under option to ARSPC have been barely sufficient to meet the supplemental fluid needs of its members during the "short" seasons. As an example, in 1975 and 1976 ARSPC had the milk of twelve supply plants under option. Taking a sample of seven days, there were twenty-two occasions on which the ARSPC shipments exhausted the supplies available in certain of the supply plants. And during the period 1972 through 1975 the following amounts were shipped: 1972 - 122,278,000 lbs.; 1973 - 233,755,000 lbs.; 1974 - 82,223,000 lbs.; 1975 - 95,374,000 lbs. (total amount shipped equaled 533,630,000 lbs.)

B. *Unilateral Activities*

The plaintiff, in its most recent brief, lists at length its complaint against the following unilateral activities of the defendant:

(1) announced non-negotiable premium prices unilaterally;

(2) cut off Kinnett's profitable hauling operation in retaliation for Kinnett's having dared to compete legitimately for supplies from individual farmers;

(3) repeatedly threatened to, and often actually did, cut off any customer who tried to replace any portion of DI's supplies, regardless of the volume involved with the contemplated substitute, the time of year, the notice afforded to DI (oftentimes more than DI gave its customers prior to cutting them off), the reason for the proposed substitution or its source;

(4) successfully warded off the entry of a potential competitor, NFO, into the Georgia market by cutting off its entire supply to Sealtest-Atlanta, some 75%-80% of that plant's requirements in retaliation for Sealtest's attempt to obtain some 20%-25% of its needs from NFO;

(5) subsequently insisted upon full supply contracts and, following successful litigation against it, committed volume contracts which tended to lock processors in to dependence on DI and lock potential competitors out of the processor market for their milk; and used additional, thinly veiled, cutoff threats to induce processors to sign the contracts;

(6) cut off Kinnett's entire DI supply on no notice in the middle of the tightest season in years, in deliberate breach of the committed supply contract which DI itself had insisted upon;

(7) continued, even after this action was filed, to take affirmative steps in an effort to stop Kinnett from

receiving alternative sources of supply, including continued threats not to deal with Kinnett (or to sell to it only at special supplemental milk prices) and renewed insistence on year-long committed volume contract, this time one which contained no ceiling or limit on the prices DI could impose unilaterally.

The plaintiff recognizes that these actions, in themselves, would not violate Section 1 of the Sherman Act because a single cooperative should be treated as a single entity, the equivalent of a business corporation, and Section 1 does not touch unilateral activity of a single enterprise.

The defendant contends that all of such activity on its part was lawful and supported by ample legitimate business justification and in fact was necessitated to protect the interests of the milk producers, and that moreover, all of it was a part of marketing and was covered by the Capper-Volstead exemption.

(1) *Premium Pricing Policy*

The plaintiff complains of the allegedly excessive prices the defendant charged for its milk. To understand the arguments surrounding this "premium" price, it is first necessary to understand the nature of the Federal Order System. Under this system, minimum prices are established by the United States government for Class I and Class II milk, with Class I milk having a higher minimum price.[13] All handlers (like Kinnett) regulated on a particular order must

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[13]The Class I price is determined for each federal order in the following manner: First, the Administrator takes the average price which a number of milk manufacturing plants in Minnesota and Wisconsin pay for Grade B milk; the Administrator then adds 90 cents to this M-W price and gets the minimum Class I price at Eau Claire, Wisconsin (the "base point"); to this base-point minimum price is added 15 cents per cwt. of milk for every 100 miles which the milk travels from the Eau Claire base point. (The 90 cents plus 15 cents/cwt/100 miles is called the "Class I differential".)

pay this minimum price for the milk they receive from the producers. All the producers share equally in the order revenues from the combined higher priced Class I sales and the lower priced Class II sales through the receipt of an announced federal order "blend" price.

The federal order does *not* establish the maximum price which producers may receive for milk which handlers purchase. Any price they charge which is in excess of this minimum price is an "over-order premium." The plaintiff complains that the over-order premiums set by D.I. were artificially and unreasonably high, and contain what plaintiff refers to as a "monopoly increment." It is the defendant's contention, however, that it was necessary to charge the premium it did for its members' milk because the minimum prices for Grade A milk in the Georgia federal order did not establish realistic prices. The Class I differential has remained basically and same since 1969 in spite of rapidly increasing transportation costs, which today are far above 15 cents per 100 miles. The defendant claims that because of these increased transportation costs and inflation, over-order pricing is necessary to attract an adequate supply of milk for Georgia handlers.

(2) *Disputes with Handlers*

(a) *Sealtest-Nashville:* Prior to their disputes, D.I. (and its predecessor) had been supplying Sealtest-Nashville with the majority of its fluid milk needs. At a February 11, 1970 meeting between Sealtest and D.I. officials, Sealtest attempted to persuade D.I. to reinstate special pricing provisions which had existed for sales made by Sealtest in the southern Kentucky area, but which D.I.'s predecessor had terminated. Sealtest, failing to get these provisions reinstated, undertook to replace about 10 percent of the milk D.I. was supplying by placing sales with National Farmers

Organization (NFO), a rival cooperative. When D.I. heard about this, it put Sealtest-Nashville on an irregular basis in supplying it milk, and notified it that all milk sold would be at Class I prices. This first dispute was resolved in April 1970, when the defendant agreed to restore the special pricing provisions and Sealtest granted the defendant the right to supply it with all milk, except that supplied by certain NFO producers. Subsequently, other disputes occurred between the parties, the net result of which was a reduction in Sealtest-Nashville's purchases of D.I. member milk from 100 percent in early 1970 to 37 percent in 1974. It should be noted that Sealtest often gave the defendant no notice as to when their sales were to be reduced, and used its NFO agreement as a wedge to secure concessions from the defendant, just as the defendant was using its strong supply position as a wedge to force Sealtest to accept a full-supply agreement.

(b) *Sealtest-Atlanta:* In the autumn of 1970, the defendant supplied some 60 percent of Sealtest- Atlanta's raw milk needs. The defendant claims that Sealtest substantially reduced its purchases from D.I. with little notice. This reduction occurred around Christmas 1970, when Sealtest gave D.I. three days notice of a 17 percent reduction of milk purchases from D.I. In retaliation, D.I. informed Sealtest that if it replaced some milk it would have to replace *all* of its purchases from D.I. Sealtest did this; however, it experienced "quality" problems with its new supplies and consequently resumed its purchases with the defendant. However, this settlement was only temporary. Other disputes occurred, and today D.I. sells little milk to Sealtest-Atlanta.

(c) *Sealtest-Chattanooga*: Sealtest's processing plant in Chattanooga purchased 100 percent of its raw milk needs from D.I. during 1970. In September of 1970, D.I. in-

creased its price for Class I milk and Sealtest began to look for other sources of supply to replace its purchases from D.I. On June 22, 1971 it informed D.I. that it had discussed an alternative milk supply of an unspecified quantity with NFO. D.I. informed Sealtest that it was not interested in being a partial supplier and warned that it would refuse to sell any milk to Sealtest if the NFO milk was purchased. In response to this Sealtest, on two days notice, replaced D.I.'s entire supply of raw milk, and purchased no more raw milk from D.I. before going out of business in 1973.

(d) *Broughton Company*: Since 1968 D.I and predecessor cooperatives had supplied Broughton the entire raw milk requirements for its Lexington, Kentucky plant. On or about April 20, 1971 Broughton advised D.I. that, beginning May 1, it would accept approximately 40 percent of its total raw milk requirements from NFO. Broughton apparently gave D.I. no prior notice of this substitution and, on May 1, returned three of the four tankers of milk it had ordered from D.I. On May 2, 1971 NFO began supplying all of the requirements of the Broughton-Lexington plant, and no subsequent purchases have been made from D.I. members.

(e) *Pet-Jackson*: In 1969 the defendant, which was supplying approximately 55 percent of the fluid milk needs of the Pet-Jackson plant, notified that plant that it would cut off its supply if Pet-Jackson did not agree within thirty days to purchase its full supply from the defendant. D.I. claims that it made the threat because of the Pet plant's tactics of periodically reducing its purchases from D.I. with little notice and of turning away split loads of milk tendered to it by the defendant. The threat was never carried out, since negotiations between the defendant and Pet-Jackson resulted in an oral agreement wherein Pet-Jackson was allowed to continue buying milk from certain other producers. Pet-

Jackson eventually ceased purchasing any milk from D.I., and purchases none from them at present.

(f) *Mayfield Dairy Farms*: The Mayfield incident primarily involved extended negotiations on service charges and on how Mayfield's supply needs would be divided between the defendant and certain independent producers. Mayfield Dairies purchased approximately 50 percent of its fluid milk from D.I. and 50 percent from independents. In September 1970, D.I. gave Mayfield thirty days to consider entering into a full-supply contract, later extending this time to December 1970. As a result of negotiations between the parties, it was finally agreed that Mayfield would pay service charges equaling approximately two-thirds of the amount which had been asked for by D.I. In addition, Mayfield agreed not to take on any *additional* independent producers as sources of supply over the amount being supplied by the independent dairy farmers then selling to Mayfield. However, Mayfield maintained these existing independent sources under the agreement's "grandfather clause."

(3) *Written Supply Contracts*

The defendant contends that it was these frustrating experiences with processors that led its Board of Directors to authorize D.I. managers to seek written sales agreements for transactions between the members and fluid processor customers.[14] D.I.'s marketing department drew up a form contract and, during the summer months of 1971, this contract was presented to each fluid processor customer regulated on a federal order. The plaintiff complains about several terms in the contract, but the main contention centers

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[14]The disputes discussed, *supra*, occurred when D.I. and these processors had only oral agreements. D.I. claims that the processors' unilateral abrogations of these "handshake" agreements is what prompted D.I. to seek written supply contracts.

on the contract's supply provision.

The original proposed contracts were termed "full supply" contracts, requiring the customer to purchase from D.I. all of its needed supplies of raw milk, except for those then being provided by other "grandfathered" suppliers.[15] The proposed contracts were to run for a term of one year, with the term beginning in the fall months when the farmers' bargaining strength was highest. Doctor Albert J. Ortego, Jr., the defendant's vice-president of marketing, explained that the "grandfather" provision was inserted because D.I. wanted to start off under the contract from where things were right then, meaning that generally speaking, D.I.'s customers to whom the contract was being presented were at that time receiving their full supply from the defendants, and D.I. wanted to go for a twelve-month period. "We didn't want to kick nobody [sic] else out but we didn't want to sell him no [sic] less milk either." Doctor Ortego testified further that this was a fully negotiable provision; that D.I. did not expect to "get that with everybody" and that D.I. fully expected that many would not accept the provision and that D.I. would have to sit down at the bargaining table and negotiate about it; that D.I. would ask for a full supply contract (modified by the "grandfather" provision) and failing to get that would settle for a committed supply agreement.

A number of Georgia processors did sign the original proposed contract promptly; others, like Kinnett, refused to sign. Two processors, Holland Dairies and the Borden Company, sought and obtained Temporary Restraining Orders against the defendant for activities which occurred as a result

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[15]Because of this grandfather clause, these original contracts cannot be characterized as *true* full supply contracts.

of a dispute over this full supply requirement.[16] Because of

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[16]*Holland Dairy Products Co.*: In July 1971, D.I. was supplying approximately 90 percent of the raw milk needs of Holland's regulated processing plant at Holland, Indiana, and was also supplying the Holland manufacturing facility at Tell City, Indiana.

D.I. and Holland had an ongoing dispute concerning the proper amount owed D.I. members for milk it had supplied Holland. The difference amounted to between $50,000 and $60,000. When D.I. presented Holland with a written sales agreement in late July 1971, Holland found a number of the provisions of the proposed contract to be unacceptable, and so advised D.I. D.I. advised Holland that if Holland did not wish to enter a written supply agreement, D.I. had other markets for its members' milk. Negotiations between the parties stalemated on August 30, 1971 and D.I. consequently reduced its September 1, 1971 deliveries to Holland by 10,000 gallons, a quantity roughly equal to Holland's daily Class II needs. At this time Holland sought and obtained on September 3, 1971 a Temporary Restraining Order to compel D.I. to resume supplying Class II milk to the Holland plant. Within a short time, the parties reached agreement on a written contract in the form of a "specified volume agreement."

Borden Co.: D.I. presented Borden's plants, along with all other customers, with written (full supply) contracts during the summer of 1971. While D.I. was attempting to negotiate with Borden for the written supply agreement, Borden cut off its entire supply of D.I. member milk at its Lexington, Kentucky plant. At the same time, Borden's Jackson and Meridian, Mississippi plants began replacing their D.I. supply with other sources of milk, sometimes refusing to accept D.I. member milk which they had orally agreed to purchase. (It should be noted that at least with Borden, there was an appreciable disparity in bargaining position, Borden being of much greater "financial stature" than the defendant). D.I. felt that the cut-off by Borden was unfair because it was done without notice. The defendant felt it necessary to get Borden's attention in order for Borden to sit down at the bargaining table and discuss a written supply agreement (Borden had a habit of stalling, or just refusing to talk to the defendant). As a result, on September 1, 1971, D.I. notified Borden that it would be discontinuing its supply of milk to the Borden-Meridian plant. However, D.I. resumed its supply to the plant after only one day because Borden sought and obtained the Temporary Restraining Order requiring D.I. to do so. The parties then met to negotiate a mutually acceptable written contract, and finally agreed to a contract which required D.I. to supply and Borden to purchase specified percentages of their raw milk supplies, and which required Borden to reduce unneeded supplies on a pro rata basis. This agreement was made a part of the order dissolving the Temporary Restraining Order and stated in part: "During any month in which Buyer's need for processing at Buyer's plant is less than the amount [shown on Exhibit A] for such month, the Buyer shall reduce its purchases from seller *and other suppliers* by diversion *on a pro rata basis*." (emphasis added)

these problems with processors over the full supply terms, D.I. entered negotiations with several processors, and together they developed an alternative supply provision.[17] This provision committed the customer to purchase, and D.I. to supply, specified quantities of raw milk each month for a year. The plaintiff never signed a full supply contract and did not sign the "committed supply" contract until January 12, 1972, making it the last Georgia processor to sign a written sales agreement.

(4) *Supply Cut-Offs*

(a) *Kinnett.* In 1973, a number of factors converged to cause a substantial increase in the cost of milk production.[18] At the same time, the quantity of milk production was decreasing. Because of this combination of circumstances, D.I. approached its handler customers, stating that higher prices were needed for milk at the producer level or a shortage of milk production was bound to result. D.I. proposed to amend the sales agreements it had with the handlers in order to obtain the suggested increase of $.73 per cwt, thus raising the price of Class I milk from $8.13 per cwt to $8.86 per cwt. All of D.I.'s customers agreed to this "Supplemental Agreement" when presented except Kinnett. Kinnett and D.I. had discussed the proposed price increase, and these discussions had led Frank McDowell, Jr., D.I.'s Georgia manager, to believe that Kinnett understood the difficult situation of the dairy farmers and would

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[17]Testimony of Ben Morgan, Jr., Executive Vice President and General Manager of D.I., indicates that the defendant was not taking an uncompromising position in the negotiations: "Naturally, I tried to sell them on full supply milk, and when I couldn't sell them on full supply, I tried to sell them a partial supply."

[18]Beginning in late 1972 and continuing through the summer of 1973 there was a severe drought in the eastern United States. This caused feed and grain production to decline. In addition to the drought, sales of grain to Russia caused increased prices for feed.

agree to the proposed price increase. However, at 3:30 p.m. on July 30, 1973, only a day before the scheduled increase was to take effect, Kinnett dispatched a letter by courier from Columbus, Georgia to Decatur, Georgia to inform D.I. for the first time that it intended to oppose the price increase. Kinnett refused to agree to this price increase unless D.I. would assure it that *all* of any price increases would be passed on to the cooperative members. D.I. considered this to be an attempt to intrude into the dairy farmers' decision-making process and rejected it.

The written sales agreements D.I. had with its customers gave any contracting customer the right to the most favorable terms of trade received by any other customer. Thus, Kinnett's refusal jeopardized the supplemental agreement with other D.I. customers and the price increase they had agreed to allow.

On August 2, 1973, D.I. refused to deliver milk to Kinnett except at the increased price then being paid by its other customers. Kinnett refused to accept the milk at that price unless the acceptance was "without waiving any right as to the price of future sales and without waiving any right under the written Sales Agreements." D.I. attached a notice to its delivery ticket requiring Kinnett to agree that acceptance of milk on that day would constitute acceptance of the higher price. When Kinnett refused to sign the delivery ticket unless D.I. signed the non-waiver statement, D.I. drove its truck away. As a result, Kinnett instituted the present litigation and obtained a Temporary Restraining Order requiring D.I. to continue selling milk to Kinnett at prices established by the contractual formula until the contract expired. During this period, the higher price was being paid by all other

Georgia customers of D.I.[19]

(b) *Borden.* A more recent dispute occurred between D.I. and Borden, Inc. concerning supplies to Borden's Macon, Georgia plant. It occurred at a time when Borden was a full supply customer and the parties were operating under an oral agreement and were engaged in a series of discussions regarding price credits which Borden was requesting and D.I. was considering for milk Borden was selling from its Georgia processing plants into South Carolina. On March 25, 1977, at the peak of the spring surplus season, the manager of Borden's Macon plant advised D.I. that Borden intended to replace approximately 25 percent of the plant's D.I. milk in three days. D.I. responded by advising Borden that it considered three days notice at the peak of the flush season to be unreasonable, and that if Borden elected to replace D.I.'s milk it could replace *all* of it at its Macon plant and its Augusta, Georgia plant as well. Borden then instructed D.I. to cease all deliveries at Borden's Meridian, Mississippi processing plant. D.I. initiated litigation, charging that Borden's three-day notice of the change in supply arrangements was not commercially reasonable notice as required by the Uniform Commercial Code. An injunction directing Borden to continue purchasing its milk from D.I. was issued. Forty days later Borden succeeded in having the injunction dissolved on the ground that a commercially reasonable time had passed since its initial notice to D.I. It immediately replaced all D.I.'s milk at its Macon plant.

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[19]In recognition of the economic conditions urged by D.I. as necessitating the price increase, the Secretary of Agriculture took steps immediately raising the minimum price by $.40 per cwt. and putting the increase in effect immediately, rather than awaiting the customary two-month lag. Also, shortly after the President froze all prices (July 1, 1973), he exempted all raw agricultural products, including dairy products, from the freeze, thus permitting processors like Kinnett to pass on their increased costs to their customers.

Borden-Augusta ultimately reduced its purchases from D.I. from 100 percent to approximately one-third of its needs between March 1977 and August 1978.

(5) *Hauling Cut-Off*

Until 1970, Kinnett hauled the milk of each of the farmers supplying it from their farms to the Kinnett plant. This included D.I.'s members as well as Kinnett's independent processors. It preferred this arrangement because the hauling operation was profitable and because Kinnett believed it could better ensure the quality and flavor of the milk in this way. On March 4, 1969, D.I.'s predecessor, GMPCA, adopted a policy of hauling the milk of GMPCA's own members to market, and in February 1970 GMPCA told Kinnett that as of April 1, 1970 Kinnett would no longer be permitted to haul the milk of GMPCA members. The general manager for GMPCA, Frank H. McDowell, Jr., advised Kinnett in effect that the reason it was at that particular time implementing, as to Kinnett, that hauling policy was because Kinnett's employees were successfully attempting to convince GMPCA members to leave the cooperative. In addition, there was concern about mixing member and nonmember milk in the same tanker, i.e., quality control problems. D.I. did not merge with GMPCA until September of 1970, after GMPCA had taken over Kinnett's hauling. However, after the merger D.I. adopted the GMPCA hauling policy and continued the transformation from processor hauling to cooperative hauling. GMPCA did not treat Kinnett differently from the way it treated other processors hauling cooperative members' milk for their own account. It took over the hauling of Pet, Inc. at Waycross in November 1969. It took over both Pet's Washington, Georgia plant and Kinnett on March 31, 1970. The evidence does not disclose that any hauler was permitted to continue haul-

ing if GMPCA, or later D.I., learned of the hauler's attempting to persuade the cooperative members to leave the co-op. Other haulers, specifically Vernon Sanders and Jack Edwards, have had hauling arrangements with D.I. terminated as a result of attempts to influence co-op members to leave their co-op.

IV
FACTUAL BACKGROUND AS TO SHERMAN ACT SECTION 2 CHARGE

The offense of unlawful monopolization consists of the possession of monopoly power *and* the element of deliberateness or general intent or purpose to acquire, use or preserve such power.[20] Monopoly power, the first element to be proven in a monopolization charge, is that power to control prices or exclude competition.[21] To determine whether or not it exists, it is first necessary to define what is the "relevant market" in which this power over prices and competition is to be tested. The relevant market consists of both a product market (the product or services affected) and a geographic market (the area within which trade may be limited).[22]

A. *Facts Relating to Product Market.*

In the present case, there is dispute as to whether the relevant product market is *all* milk as the defendant contends, or only Grade A milk, as the plaintiff contends. The

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[20]*See, United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945); *United States v. United Shoe Machine Corp.*, 110 F.Supp. 295 (D. Mass. 1953) *aff'd per curiam*, 347 U.S. 521 (1954); *cf. United States v. Griffith*, 334 U.S. 100, 105-06 (1948).

[21]*United States v. Grinnell Corp., supra*, at 571; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Griffith, supra*, at 105.

[22]*Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

term "Grade A" means raw (unprocessed) milk which has met specified state sanitation, health, and quality standards, and is therefore available for sale for human consumption in *fluid* form.

Producers in the industry are recognized as either Grade A or Grade B. Grade A producers generally receive more for their milk Grade B producers. To be a Grade A producer, a farmer must meet the standards mentioned above with respect to both production and storage. These standards are much more strict with respect to Grade A milk than Grade B. In addition, production of Grade A milk requires a higher initial capital investment than Grade B production, e.g., installation and refrigeration of bulk tanks for storing milk on the farm. Consequently, a producer does not simultaneously produce Grade A milk and Grade B milk from the same facilities.

Grade A milk is distinguishable not only in terms of who produces it, but also in terms of who its customers are. A customer (processor) who processes milk into both fluid and manufactured form at one location can, for sanitation reasons, receive only Grade A into its plant. Also, only handlers receiving Grade A milk from producers are subject to regulation under federal milk marketing orders.

Grade A milk is generally recognized in the industry as a distinct product and line of commerce for fluid consumption, even though it is true that Grade A milk can be used for both fluid *and* manufacturing purposes. This is so because whatever interchangeability there is is one-way; i.e., though Grade A milk may be used for Class I, II or III purposes, Grade B milk can *never* be used for Class I (fluid) purposes. It should be noted that D.I. itself has a separate division, D.I. Manufacturing, Inc., to deal with manufactured milk products which can be made from Grade B milk.

B. *Facts Relating to Geographic Market.*

The second component of the relevant market is the geographic market—that physical area in which sellers of the particular product operate and to which purchasers can practicably turn for such products.[23] It is the plaintiff's contention that the relevant geographic market is the FMO-7 area, which has the same boundaries as the state of Georgia, except for eight counties in the extreme northwestern corner of the state traditionally associated with the Chattanooga market and one in northeast Georgia, or alternatively the area covered by nine of the sixteen federal orders under which it operates. The defendant, however, contends that the relevant geographic market encompasses an area much larger than the state of Georgia, including either (1) all states east of the Rocky Mountains, (2) nineteen states in which it markets milk, (3) fourteen states in the southwest in which it markets milk and has members, or (4) at the very least, Georgia *plus* the surrounding states of Alabama, Tennessee, North Carolina and South Carolina.

(1) *The Area in Which Seller Operates*

As for the first prong of the geographic market definition, that area in which the seller operates, the evidence in the present case shows that D.I. has members in fourteen southeastern states and markets its members' milk in an even wider geographic area. When D.I. was formed in 1968 it took over eight cooperatives located throughout the southeastern states. Its operation extended into Virginia, Louisiana, Kentucky, southern Illinois, and Mississippi. Since 1968 producers in the additional states of Alabama, Georgia, Missouri and Florida have become members of D.I. Its operations have extended also into southern Indiana,

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[23]Tampa Electric Co. v. Nashville Co., 365 U.S. 320, 327 (1961).

Tennessee, parts of West Virginia, North Carolina and South Carolina. In addition, D.I. occasionally markets milk in Ohio, Maryland, Washington, D.C. and Puerto Rico.

(2) *The Area to Which Buyer Can Practicably Turn*

In determining whether the plaintiff could practicably turn to an area outside of the FMO-7 area for a source of supply, it is necessary to consider evidence on several points, including the nature of milk and its movement in general, where the plaintiff attempted and succeeded in purchasing milk, and the concepts of down allocation, compensatory payment, and base plan.

Raw milk is a perishable product which is subject to bacterial contamination within hours after it is produced. This bacteria growth which can render milk unsuitable for fluid use is a function of time and temperature. Until recently, this time factor prohibited the movement of milk over any appreciable distance. However, two factors have combined to make long distance movement of milk feasible; they are the completion of the interstate highway system and technological advances in storage and hauling facilities. As a result, milk can move and is being moved long distances. For example, studies of bulk milk shipments for 1975 showed that the average distance was 350 miles. About 40 percent of the shipments were for distances of less than 200 miles, 30 percent were for distances of 201 to 400 miles, 25 percent were for distances of 401 to 700 miles and 5 percent were over 700 miles.

In addition to the evidence of the movement of milk generally, Kinnett's own purchases support the argument for a relatively broad geographic market. During the period from 1968 to the present, Kinnett searched for and actively negotiated with numerous raw milk sources outside Georgia. Some of these attempts to purchase milk were successful;

others were not. For example, Kinnett purchased approximately one-half of its raw milk requirements from Tennessee between May 1968 and December 1970 and 20 percent of its supply from Alabama between March 1975 and November 1977. In September 1979 Kinnett began to purchase raw milk supplies from Alabama Milk Producers (AMP), Southern Milk Sales, Inc. and Southern Bell Dairies. This milk is produced in Alabama, Tennessee and Kentucky and comprises over one-half of Kinnett's supply. It has, since September of 1979, completely replaced D.I.'s milk in Kinnett's plant. In addition to the above-mentioned purchases, the plaintiff made other less substantial out-of-state purchases from 1968 to 1979. These purchases were from Nashville and Chattanooga, Tennessee; Louisiana, Mississippi and, in a couple of instances, from Minnesota.

(3) *Down Allocation, Compensatory Payments and Base Plan*

Three other factors to consider in determining that area to which the plaintiff can practicably turn for its milk supply are the concepts of "down allocation", "compensatory payment" and "base plan". The plaintiff contends that these concepts operate to erect a barrier around the FMO-7 area and, by this isolation, make it the relevant geographic market in the present case.

Plaintiff contends that these three concepts impose a regulatory "tax" upon the importation of milk from outside the market order area, explaining, however, that tax must be put in quotation marks because it is not really a tax—"It is just [that] the operation becomes taxing so to speak"; that it raises the cost to the handler and the proceeds of the costs are distributed to the producers in the importing market. The experts explain that the regulatory tax applies only to interhandler shipments like from Sealtest in Chattanooga

to Kinnett in Columbus, and that it does not apply to producer milk that goes into an area. This interhandler regulatory tax is broken into two categories: (1) if the interhandler shipment originates in one *regulated* area and goes into another, we have the "down allocation" of some of that shipment to Class II, and (2) if the shipment originates in an *unregulated* area and moves into a regulated area, we have the down allocation just mentioned, plus a "compensatory payment" levied on any of the milk that is not down allocated. In these interhandler shipments the shipper usually has more milk than it needs and the purchaser can buy it at a cost lower than its local prevailing price. This regulatory tax fluctuates — the higher the Class I utilization rate goes, in other words, the lower the surplus is, the lower the regulatory tax. This is designed to encourage milk movements only when needed for Class I use and to provide disincentives for milk flows between markets unless there is in fact a true shortage.

The term "down allocation" is not used in the FMO-7 but the experts explain it this way. Under the federal order marketing system, Class I prices vary from zone to zone by addition of the mileage increment as we come south. Thus, if Kinnett brings down from Chattanooga a tanker of Class I milk it would be paying in effect the Chattanooga Class I price for that milk in Chattanooga, plus the transportation costs to Columbus and that would be approximately equal to the Columbus Class I price for the milk. But under the regulatory tax system the administrator is going to require Kinnett to treat that load of milk as part Class I and part Class II, the Class I amount being the percentage of milk in Kinnett's plant that is Class I, or the percentage of milk in the entire FMO-7 area that is Class I whichever is lowest. The remaining portion of the load is allocated down to Class II—hence the term "down allo-

cation". The significance of this down allocation is this: Class II prices do not vary between orders. They are the same everywhere. It is not contemplated that a processor will haul Class II milk great distances to manufacture it into cheese, for instance. That would be what the esoterics refer to as "hauling the water." It is more economical to utilize the Class II milk wherever it is and then transport the cheese, for instance, at lesser transportation costs. The Class II price in Chattanooga being the same as it is in Columbus, Kinnett is going to have to pay transportation costs over and above the Class II price in Columbus for that down allocated Class II milk. If the applicable utilization rate is 80 percent Class I and 20 percent Class II, this means that Kinnett must be deemed to have used only 80 percent of the shipment for bottling and the other 20 percent for the ice cream line though he may have actually used all of it for bottling purposes. The experts say that this means that Kinnett is going to have to pay the local producers for that additional 20 percent at the Class I price.

As noted these regulatory tax factors do not apply to producer milk and do not deter producers in one state from dealing with processors in another. For example, in 1975 about 20 percent of the milk pooled on the Georgia order was produced outside Georgia and was subject to no regulatory tax. When the down allocation does apply, the only thing involved is the transportation costs from one point to the other. To the extent there is down allocation this means only that such imported milk will have the same utilization percentages as the milk of the producers regularly supplying the Georgia regulated plants, and any disadvantage of the handler from receiving other order milk occurs only when transportation costs exceeds the blend price difference between the shipping order and the receiving order.

The "compensatory payment" above mentioned applies only to unregulated milk, that is, milk which is not priced under the federal order system. This means that the handler can buy the milk at any price. The compensatory payment means only, according to the experts, that the system is treating the unregulated milk in such a way that it does not receive better treatment than producer milk.

Georgia producers have a Class I base plan which followed in time their seasonal base plan. The purpose of the seasonal base plan was to influence producers to produce milk when it was most needed and to produce less at other times. A number of federal orders have such plans. The Class I base plan had the same purpose and also tried to control the total amount of milk produced in the order area. It succeeded in influencing the seasonality of production by evening it out but did not succeed in controlling production. Production in Georgia increased after the institution of the Class I base plan. There are quite liberal and practical provisions in the order for acquisition of Class I bases by new producers whether they are located within or without the order area.

Under the federal order classified pricing system each order defines a "marketing area" which is the geographically defined area within which if a processor/handler makes a specified percentage (15 percent in the "Georgia Federal Order," FMO-7) of fluid milk sales (called "in area fluid route disposition" or "route sales" for short), he becomes subject to price regulation under the order. The marketing area may indicate less, all or more than one state.

Because handlers operate their businesses thru plants, these orders in practice regulate the plants of the handlers. Thus the plants having the required in area fluid disposition are called fully regulated pool plants. Under certain conditions, plants which produce no fluid products but which

sell specified percentages of milk to distributing plants or meet other requirements may be pool plants as well. Federal orders directly regulate handlers—not producers—though producers—not handlers—decide whether to petition for a federal order. Federal orders do not guarantee producers a market—only a minimum price.

The federal orders do not directly regulate the location of the farms producing the milk or direct where the milk shall be sold. They do not directly regulate the location of the handler or its plant facilities. The marketing area of an order is only the geographic area in which the handler must make a specified percentage of sales of fluid milk products in order to become subject to the regulations of the order.

This is not to say that there is no connection or relationship between the order and the location of the dairy farms and the location of the handlers purchasing the milk. The producers in petitioning for a federal order ask the government to define an area that includes their nearest direct competitors and their major processor outlets. So it is that the most of the milk processed in the FMO-7 area is, in fact, produced there and *vice versa*, and the same is true with respect to D.I.'s overall territory. Classified pricing was designed for two purposes—to maintain an adequate supply of milk by means of prices high enough to encourage local production, and to prevent disorderly marketing conditions as in cases of price war activity.

(4) *The "Submarket" Contention*

The plaintiff concedes that there is a price interrelationship between all, or substantially all, of the federal order areas east of the Rocky Mountains which may be enough to consider—from a highly analytical, economic viewpoint—those areas taken together to be a relevant geographic market. However, the plaintiff contends that the practical

ability to transport milk for regular supplies within that area is in fact minimal. Consequently, Kinnett does not see it as a viable alternative to FMO-7 as the relevant geographic market.

With respect to the FMO-7 area (Georgia), plaintiff contends that it is the relevant geographic market. Plaintiff contends further, however, that even if it is too small to be considered the geographic market, and even if some larger area should be determined to be the relevant geographic market, nevertheless this smaller area qualifies as a, or the, relevant geographic *sub*market. This contention will be discussed *infra*.

Plaintiff also suggests nine federal order areas included in D.I.'s marketing territory[24] as either the relevant market—or at least as a submarket of the federal order areas east of the Rockies. The plaintiff contends that because federal order areas generally share a number of common marketing conditions. Georgia processors would therefore normally look to these areas — particularly the ones to the north and northwest of Georgia which are in D.I.'s territory—as the most likely alternatives to Georgia supplies of raw milk.

The defendant cites what it considers to be several defects in the plaintiff's proposed submarket argument. The first is that the submarket fails to include seven additional federal orders in which D.I. markets milk,[25] all of which are within

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[24]These orders are: FMO-46 (Louisville/Lexington/Evansville); FMO-7 (Georgia); FMO-101 (Knoxville); FMO-11 (Appalachia); FMO-99 (Paducah); FMO-90 (Chattanooga); FMO-98 (Nashville); FMO-103 (Mississippi); and FMO-94 (New Orleans).

[25]These orders are: FMO-4 (Middle Atlantic); FMO-6 (Upper Florida); FMO-13 (S.E. Florida); FMO-32 (Southern Illinois); FMO-33 (Ohio Valley); FMO-96 (Greater Louisiana); and FMO-97 (Memphis).

a 1,200 mile range considered "feasible" to transport milk.[26] In addition, Kinnett has not included the states of North Carolina, south Carolina and Alabama in its proposed submarket—Even though D.I. members reside, produce and market milk in those states—because milk sales in those states are regulated by state law. The defendant contends that exclusion of these market areas and states from the alternative relevant geographic market or submarket is not permissible under the facts.

In responding to the plaintiff''s submarket argument, D.I. also offers some alternative relevant geographic markets. It contends that the evidence supports a determination that the relevant market is either D.I.'s fourteen state marketing territory or Georgia plus its adjacent states, other than Florida, which is not considered a practicable source. According to the defendant, this comports with the reality of the way in which D.I. built and conducted its business, and is the better identification of that "market area in which the seller

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[26]Albert E. Scott, a representative of NFO and a witness summoned by Plaintiff to testify through prior trial testimony from *United States v. Dairymen, Inc., supra*, testified that raw milk can be moved 1,500 miles and retain high quality:

> Q And if the milk is so, if the tanker is so pre-cooled and sanitized and you put high quality milk in it with a temperature of about 34, 35 degrees, there is no problem moving that milk as much as 1,500 miles, is there?
> A Milk can certainly be moved that far and remain good quality.
> Q And does that move that far all the time?
> A And does move that far, yes, sir.
> * * *
> Q So it is not unusual for milk to move great distances today because of the way it is handled?
> A Yes, sir, that is correct.
> Q And particularly in the Fall of the year milk moves in large quantities from the north into the deficit areas here in the south, your region?
> A It certainly does during the Fall of the year, there is a movement of milk, yes, sir.

Scott *U.S. v. DI* Tr. 951-52.

operates."[27] In addition, as noted above, a substantial portion of bulk milk movements, approximately 25 percent, are movements which cover between 400 and 700 miles, an area roughly coincident with D.I.'s fourteen state marketing territory when viewed from Atlanta.

C. *Facts Relating to Market Power.*

After the relevant product and geographic market has been defined, the court must determine what degree of market power the defendant possesses in that market. The primary indicator of market power is what *share* of that market the defendant has.[28] There are no static ranges of permissible and impermissible market share. "The relative effect of percentage command of a market varies with the setting in which that factor is placed.[29]

(1) *Defendant's Share of the FMO-7 Area*

D.I.'s share of the Georgia marketing area has ranged from a high of 75 percent in 1970 to a low of 58 percent in 1979. The plaintiff claims, however, that these figures grossly understate D.I.'s effective market share and its actual market power because D.I. and the other Georgia-based cooperatives all collaborated in the Georgia Super Pool which funneled all milk sales to third parties through D.I. The *Combined* market share of the Georgia Super Pool, including D.I., ranged from a high of at least 90 percent to a low of 65 percent, and according to U.S.D.A. calculation, the

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[27] *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. at 327.

[28] *United States v. Griffith*, 334 U.S. 100 at n. 10.

[29] *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948). In *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969), the court noted that monopolization has never been found when the percentage of the market is below 70 percent. In *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n. 2 (5th Cir. 1969) the Fifth Circuit indicated that "something more than 50 percent of the market is a prerequisite to a finding of monopoly."

90 percent share was maintained at least through 1975. Because the Super Pool members operated a single business unit, Kinnett claims that *these* shares are more accurate indicators of D.I.'s market power in Georgia than D.I.'s share alone, and consequently, that D.I. effectively controlled the price of all of the cooperative milk in Georgia — 75 percent to 90 percent from 1969 through 1973, and at least 65 percent in the years since 1973.

The defendant claims that Kinnett's attempt to tack the market shares of the other member cooperatives of the Georgia Super Pool onto D.I.'s share is factually unsupportable and legally impermissible. D.I., as agent for the other members of the Super Pool onto D.I.'s share is factually unsupportable and legally impermissible. D.I., as agent for the other members of the Super Pool, does *not* control these other members' milk. Each co-op member operates (or operated) a processing plant which processed their members' milk into fluid products and most also utilized their members' milk in small scale manufacturing operations. The Super Pool Agreement established GMPCA and later D.I. as the common marketing agent for milk *in excess* of these *plant* needs. Thus, the only milk which D.I. as agent might be said to have controlled is that *surplus* milk actually turned over to it for marketing, a quantity which the defendant contends has been inconsequential.

As for its own market share of the Georgia federal order, D.I. acknowledges its 73 percent control in 1971; however, it points out that even at this peak level, D.I. members' share of the market was thus below the 75 percent market share government antitrust experts believe to be the minimum necessary for a cooperative to control prices effectively. In addition, the defendant notes a consistent decline in D.I. members' share of the market from 1972 until 1979:

1972 — 69 percent, 1973 — 66 percent, 1974 — 63 percent, 1975 — 60 percent, by 1978 — 59 percent, and in 1979 — 58 percent.

(2) *Defendant's Share in Each of its Four Proposed Alternative Markets*

The defendant offers four alternative relevant geographic markets. In the one D.I. considers the most relevant, the area east of the Rocky Mountains, it marketed approximately 5 percent of all milk marketed in that area and about 6 percent of all the Grade A milk marketed. In nineteen of the states east of the Rocky Mountains which comprise at least a portion of the supply area for the southeastern United States, D.I.'s share of the total Grade A milk production was between 8 percent and 13 percent. The plaintiff's response to these statistics is two-fold. First, the plaintiff opposes their use because they are based on D.I.'s market share in the *wrong* georgaphic area. Second, the plaintiff complains that these figures are, like those on D.I.'s Georgia market share, an understatement of its *true* market power, because of the joint activity of D.I. and other cooperatives in that area in fixing prices and neutralizing competition.

The defendant's third alternative relevant market is the thirteen states where D.I. members produce milk.[29a] Its aggregate share of the total milk production in that area for the period from 1971 through 1979 ranged from a low of 23.5 percent in 1973 to a high of 25.5 percent in 1976. When only Grade A milk is considered, D.I.'s aggregate share did not exceed 30.2 percent in any of the same years in this area. The plaintiff's criticism of these statistics is the same as that offered against the "east of the Rocky Moun-

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[29a]The state of Florida is not included in this alternative because, being a deficit area, it is not considered an available source.

tains'' statistics.

The defendant contends that the *smallest* possible relevant geographic market is Georgia and the adjacent states of South Carolina, North Carolina, Tennessee and Alabama. D.I.'s market share of the total milk production in this area between 1971 and 1979 was between 35.5 percent and 38.9 percent. Its aggregate share of the total Grade A volume in these five states for the same period did not exceed 42.4 percent for any year.

(3) *Defendant's Share in Plaintiff's Proposed Nine-Federal Order ''Submarket''*

The plaintiff contends that, within its proposed nine-federal order ''submarket'', D.I. has had a significant market share for the relevant period of time to constitute monopoly power. In the nine federal orders listed, its market share ranged during the period from 1969 — 1975 as follows: Order No. 46 — 89 percent to 74 percent; Order No. 7 — 72 percent to 60 percent; Order No. 101 — 98 percent to 99.6 percent; Order No. 11 — 99 percent to 98 percent; Order No. 99 — 100 percent to 85 percent; Order No. 90 — 77 percent to 75 percent; Order No. 98 — 93 percent to 78 percent; Order No. 103 — 83 percent to 69 percent (date for this order ending in 1973); Order No. 94 — 81 percent to 57 percent.

The defendant's response to this evidence is that it is ''radically incomplete'' in that it includes only a part of D.I.'s federal order area and no part of the state regulated marketing area. There are, for example, seven additional federal order areas in which D.I. markets its members' milk. If these seven are added to the nine listed by Kinnett, D.I. would have a combined market share of only between 28 percent in 1971 and 22 percent in 1979. Additionally, as to

the nine listed, they show a steady decline in D.I.'s market share, which D.I. contends demonstrates the tenuous and transitory nature of market power.

V

CONCLUSIONS OF LAW AND APPLICATION OF THE FACTS TO THE LAW

Defendant DI is a nonprofit agricultural milk marketing association, all of whose members are dairy farmers. As such, DI is entitled to the benefits of the antitrust exemptions provided by Section 6 of the Clayton Act (15 U.S.C. § 17) and the Capper-Volstead Act (7 U.S.C. § 291). It is appropriate therefore to determine the extent of those exemptions.

Recurring agricultural depressions convinced the Congress that farmers needed congressional help. They had always been prictakers, standing relatively helpless before those who would purchase their products. The Congress through Section 6 of the Clayton Act, as early as 1914, and more extensively through the Capper-Volstead Act of 1922, following the severe agricultural depression of 1920, deliberately set about to enable farmers to organize and band together in order to acquire and exercise marketing power comparable even to that of the sizeable corporate structures bargaining with them for their product. Section 6 of the Clayton Act specifically authorized "the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help . . ." and the "lawfully carrying out [of] the legitimate objects thereof" and ordained that "such organizations or the members thereof, [would not] be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." Eight years later, to make the matter more specific, through

the Capper-Volstead Act the Congress specified that "persons engaged in the production of agricultural products as . . . dairymen . . . may act together in associations . . . in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce such products. . . . Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes."

While price-fixing arrangements are generally held to be per se violations of Section 1 of the Sherman Act, *White Motors Co. v. United States*, 372 U.S. 253, 260 (1963), no one would question today the right of farmers acting together in organizations or associations to fix the prices they agree to charge for their products. It is now fast becoming clear also that cooperatives of farmers may unite into associations which may perform marketing functions and which may have "marketing agencies in common." In other words, cooperatives may co-operate or associate or federate with other cooperatives, among themselves, and still enjoy the exemptions provided by these statutes. Such activities on the part of such cooperatives acting separately or collectively do not constitute contracts, combinations, or conspiracies in restraint of trade in violation of Section 1 of the Sherman Act, nor, though the purpose of such cooperative efforts and activities be the acquisition of as much market power as possible, do they constitute monopolizing or attempts to monopolize, or combinations or conspiracies to monopolize in violation of Section 2 of the Sherman Act subject only to the caveat with respect to both sections of the Sherman Act that such activities must be confined to farmers and their organizations and not include "out-

siders,"[30] and must not include "predatory" activities.[31]

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[30]*United States v. Borden Co.*, 308 U.S. 188 (1939).

[31]*Maryland & Virginia Milk Producers Assn. v. United States*, 362 U.S. 458 (1960)

The word "predatory" has unenviable connotations. In *Maryland & Virginia, supra*, the Supreme Court said that a Capper-Volstead organization could not "achieve monopoly by preying on independent producers." Webster's New International Dictionary, Second Edition Unabridged, 1953, defines the word "prey" in the intransitive sense as "to make a raid or raids for the sake of booty; to commit deprivations, to seize and devour prey . . . to commit violence or inflict harm in or through predaciousness; as cats prey upon robins; sharpers that prey on the poor", and in the transitive sense, "to plunder; pillage; rob; also to take as prey." The same authority defines predatory as "of, pertaining to, or characterized by, plundering, as predatory instincts; practicing rapine; given to plundering or robbery; plundering, pillaging; as, predatory excursion or party" and also "destructive, consumptive, injurious." One court conservatively remarked that "[t]he term [predatory] probably does not have a well-defined meaning in the context it was used, but it certainly bears a sinister connotation." *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d 894, 927 (10th Cir. 1975). Professor Sullivan treats predatory conduct at some length as follows: "Predatory business conduct can be defined as conduct which has the purpose and effect of advancing the actor's competitive position, not by improving the actor's market performance, but by threatening to injure or injuring actual or potential competitors, so as to drive or keep them out of the market, or force them to compete less effectively. The earliest cases labeled predatory conduct as a violation of Section 2 when it was used to gain or hold monopoly power; the predatory monopolist became a figure in the national demonology."

"There has been much talk about predatory behavior, but few efforts to analyze it. Businessmen and judges think they know it when they see it. Economists tend to doubt that it occurs, at least very often, because it is likely to cost the firm using it more than can be gained from it."

. . . .

"[T]here will be something odd, something jarring or unnatural seeming about it. It will not strike the informed observer as normal business conduct, as honestly industrial." Sullivan, *Antitrust Law*, 108, 111-112 (1979).

There is a trend towards stretching the word predatory so as to let it include less pejorative conduct; for instance, conduct may be classified predatory if it evidences an intent unnecessarily (*see Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977)); unreasonably (*see Sherman v. British Leyland Mtrs., Ltd.*, 601 F.2d 429 (9th Cir. 1979); *In re IBM Peripheral EDP Devices, etc.*, 481 F.Supp. 965, 1003 (N.D. Calif. 1979)); or illegally (*see*,

(footnote continued on following page)

We agree with the holding in *Fairdale Farms, Inc. v. Yankee Milk, Inc., et al.*, ___ F.2d ___, 2nd Cir., Nos. 1128, 1412, 1413, (at 6635), (Dec. 9, 1980), that "Capper-Volstead gives farmers the right to combine into cooperative monopolies. The Act places no limits on combinations; it does not forbid farmers from combining after their cooperative reaches a certain size" and that while normally a firm is not permitted wilfully to acquire monopoly power,[32] that prohibition does not apply to agricultural cooperatives because "Capper-Volstead permits the formation of such cooperatives and places no limitation on their size. As the cooperative grows, so, normally, does its power over the market. Thus while the formation, growth and operation of a powerful cooperative is obviously a 'wilful acquisition or maintenance of such power', and will rarely result from a 'superior product, business acumen or historic accident,' it is exactly what Capper-Volstead permits." *Id.* at 6645, 6646. With equal clarity, *Fairdale* continues at 6646, "We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means. It is not a violation of the Sherman Act for the members of an agricultural cooperative to carry out the legitimate objectives of their association which follow naturally from their attempts to achieve unity of effort and the voluntary elimination of competition among themselves." *Fairdale*

Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market"*, 38 George Washington L. Rev. 215 (1969)), to exclude a competitor from a market. *See also, Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F.Supp. 125, 140 (D. Mass. 1959), where Judge Wyzanski seems to equate predatory practices with "unfair methods of competition, or business patterns not honestly industrial—in short, what may loosely be called unfair means."

[32] *Grinnell v. United States*, 384 U.S. 563 (1966).

Farms is commended for its illuminating references to the legislative history of Section 6 of the Clayton Act and of the C-V Act, for its copious references to subsequent congressional enactments favoring farmers and expressing congressional concern over troublesome surpluses in farm products and for its thorough review of the limited but growing number of cases dealing with the scope and effect of Section 6 of the Clayton Act and of the C-V Act.

D.I. by fair and legitimate means may lawfully recruit as many farmer members as it can succeed in recruiting. This is true even though the combined production of the D.I. members represents a dominant share of the available milk production. The fact that this combined production might be considered "a monopoly" if it involved non-agricultural products, such as automobiles or coal, does not make D.I. subject to the antitrust laws applicable to other kinds of business. The acquisition and growth of market power by farmers through voluntary association in agricultural cooperatives is not only tolerated by the terms of the Capper-Volstead exemption, but is encouraged. Thus, even if D.I. has acquired a dominant share of any relevant geographic market in the supply of raw milk, D.I. has not exceeded the scope of its agricultural exemption.

D.I. as agent for its members may lawfully perform for them all of the tasks necessary to the processing, preparing for market, handling and marketing of their milk. This may include the collecting of milk at the farms of the members, testing the milk, hauling it to market, processing it for the market and its actual sale.

In marketing the milk of its members, D.I. may lawfully fix the price or prices at which the milk will be sold and, in seeking to obtain the best price for the milk, may exercise such market leverage as is afforded by managing in the market the combined production of its members. Thus,

through D.I. its members can present a common, agreed upon price to milk buyers like plaintiff Kinnett even though similar conduct by private businessmen who are not farmers would be "price fixing" in violation of the antitrust law.

D.I., in marketing the milk of its members, may—as may an individual non-farmer businessman—refuse to sell to one or more individual customers provided D.I. does not have a monopoly of the milk, or having a monopoly, does not engage in a refusal to deal upon reasonable terms, such refusal being for the purpose of maintaining the monopoly. It necessarily follows that a cooperative like D.I. may refuse to sell to a purchaser that fails to meet any of the fair, reasonable and lawful terms or conditions set by D.I. for the sale. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973); and *Town of Massena v. Niagra Mohawk Power Corp.*, 1980-2 Trade Cases, ¶ 63,526 at 76,802.

A cooperative like D.I. may lawfully allocate certain territories for the sale of certain of its members' milk and other territories for the sale of other members' milk.

Not only do the individual dairy farmers acting together in D.I. enjoy the benefit of the Capper-Volstead exemption, but it is also enjoyed by D.I. in its joint endeavors with other associations which enjoy the exemption, either because they are themselves cooperatives like D.I. or because they are common marketing agents performing marketing functions for their cooperative members. These common marketing agents may perform the same function on behalf of their members as the members can perform on behalf of their farmer members, and D.I.'s members may voluntarily eliminate competition among themselves, and D.I. and the other similar associations with which it conducts joint endeavors can voluntarily eliminate competition among themselves. *Fairdale Farms v. Yankee Milk, Inc. et al., supra.*

Even in the absence of the formal designation of a marketing agent in common, agricultural cooperatives like D.I. can act together through common marketing agencies or federations of cooperatives in processing, preparing for market, handling, marketing and pricing the members' products. Thus, cooperative dairy organizations can agree among themselves on prices they will charge for their products and can allocate sales territories and customers among themselves if this furthers the legitimate marketing purposes of the farmers, even though the antitrust laws may forbid other types of organizations from combining together in similar conduct. *See Fairdale Farms v. Yankee Milk, Inc. et al., supra.*

As stated *supra,* Section III B, plaintiff in its last brief groups together under seven headings certain types of conduct of defendant which plaintiff charges are predatory. The conduct referred to is the announcement of negotiable premium prices unilaterally, cutting off plaintiff's profitable hauling operation, cutting off customers who tried to replace portions of D.I.'s supplies, warding off the entry of a potential competitor (NFO) into the Georgia market by cutting off or threatening to cut off defendant's supply to Sealtest-Atlanta in retaliation of Sealtest's attempt to obtain a portion of its needs from NFO, insistence upon full supply contracts, cutting off of plaintiff's supply August 1, 1973 and alleged efforts of defendant even after this action was filed, aimed at stopping Kinnett from receiving alternative supplies, including alleged continued threats not to deal with plaintiff (or to sell to it only at special supplemental prices), and alleged renewed insistence on year long committed volume contracts, this time contracts which contained no limit on the price D.I. could impose unilaterally. After careful consideration this court finds that under the circumstances none of the conduct complained of was predatory in any sense

of the word.

The entire spirit of Section 6 of the Clayton Act and of the Capper-Volstead Act was its purpose to free farmers from the role of pricetakers and to enable them through joint action to agree upon, announce, and with some measure of assurance and confidence insist upon the agreed upon price for their product. It may be observed that over-order pricing or premium pricing does not necessarily equate with "gouging". The United States government through the market order system does not purport to establish fair or reasonable prices — only minimum prices. The Department of Agriculture encourages producers through their cooperative organizations to bargain for fair and reasonable prices above the established minimum prices. Over-order and premium prices obtained throughout the nation. They are not peculiar to Georgia or the Southeast or to D.I.[33] In 1976, the National Consumer's Congress petitioned the Department of Agriculture to look into prices of milk as it is authorized to do under Section 2 of the Capper-Volstead Act in order to determine whether the price of any agricultural product is "unduly enhanced". The DA conducted such an investigation through a "Capper-Volstead Committee" whose lengthy report was filed in December 1976. In that report appear these statements: "With respect to the cost-price squeeze Dairymen, Inc. producers were in much the same position during the 1974-75 period as other producers

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[33]*Fairdale Farms, Inc. v. Yankee Milk, Inc.*, C.A. No. 75-140, D. Vermont, (Nov. 2, 1979) involved seven northeastern dairy cooperatives. The court there said: "In the northeast, both the Secretary of Agriculture and the state agencies regulate the price of raw milk by imposing floors under the price handlers must pay producers. Nevertheless in 1973 and 1974 producers faced rapidly increasing production costs that were not being met by rises in the regulatory floors. To protect their members from this cost-price squeeze, seven cooperatives formed RCMA which in September, 1973, set a price for its members' milk above the federal floor (the production incentive differential)."

throughout the country. Even though over-order charges in the D.I. markets were at record-high levels in late 1974, the amount of cash available after paying feed costs was at record-low levels." PX 524, p. 47.

"In the general area in which Dairymen, Inc., operates, at least five states (Alabama, North Carolina, South Carolina, Louisiana and Virginia) were involved during this period in establishing class prices to handlers. The Class I prices established by these sttes have been substantially above Federal order Class I prices and are more nearly in line with the cooperative's actual prices." PX 524, p. 47.

"There is no evidence of present undue price enhancement by any cooperative. Effective Class I prices are at or below the costs of alternative supplies . . . ." PX 524, p. 53.

With respect to plaintiff's complaint against the so-called full supply contracts, we are reminded that the Supreme Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 333 (1961), said: "It may well be that in the context of antitrust legislation protracted requirements contracts are suspect, but they have not been declared illegal per se. Even though a single contract between single traders may fall within the initial broad proscription of the section, [the section under consideration by the Court was Section 3 of the Clayton Act, 15 U.S.C. § 14] it must also suffer the qualifying disability, tendency to work a substantial — not remote — lessening of competition in the relevant market." The Court then observed that such contracts "may well be of economic advantage to buyers as well as to sellers" affording the buyer an assurance of supply and the seller the possibility of reduction of selling expenses, protection against price fluctuation and the possibility of a predictable market. It should be noted, however, that D.I. never sought full supply contracts. The contracts it sought

contemplated and contained appropriate grandfather provisions. Furthermore, D.I. never insisted upon such quasi full supply contracts; it preferred them and asked for them but this preference and asking was negotiable and D.I. was ready to settle and frequently, if not uniformly, settled for a committed supply contract to which any processor would be hard put to raise objections since such contracts were bilateral and imposed upon D.I. the obligation to supply. The government admitted in the case of *United States of America v. Dairymen, Inc.*, 1978-2 Trade Cases ¶ 62,186 at 75,305, that the twenty-two committed supply agreements were not inherently predatory, contending only that they were part and parcel of an attempt to monopolize. Actually because of the cyclical nature of milk production — its scarcity in some months and over abundance in others — and because of the propensity of some processors like Kinnett to purchase from D.I. only at times of scarcity and from their independent producers at times of over abundance, thus saddling upon D.I. the burden and responsibility of finding a market for the surplus milk, and at times the necessity to haul it to manufacturing plants in other states, there were solid business reasons for D.I.'s preference for grandfathered full supply contracts on a yearly basis thus covering one annual cycle, and for its insistence upon committed supply contracts thus requiring its purchasers to treat it equally with independent suppliers.

In the case of *Federal Trade Com. v. Motion Picture Adv. Co.*, 344 U.S. 392 (1953), the Supreme Court approved a determination by the Federal Trade Commission to the effect that exclusive contractual provisions extending for only one year were permissible under the antitrust laws.

The plaintiff complains further that several of the detailed provisions of the contracts were unduly restrictive upon the processor and even that their charges were sometimes du-

plicative. A careful analysis of such charges, however, shows that they were reasonable and necessary from the defendant's point of view in order to assure it treatment equal to that accorded by the processors to their independent suppliers with respect to the handling and disposition of surplus milk and that such charges were in no sense duplicative except in one minor instance as to a charge of 8 cents per cwt as to which there exists some uncertainty. The pricing formula of D.I.'s first written supply agreements included a service charge of 8 cents per cwt of Class I milk. The agreement indicates that this charge was designed to defray or help defray the cost of a series of services D.I. provides to the market in general and to customers in particular. The listed services include non-brand advertising of milk and other dairy products, coordination of producer's assignment to customers through route organizations and production of producer payroll records, laboratory tests for both quality and butterfat and field services to insure the continued quality of D.I. members' milk. The actual cost of these services has been estimated at 26 cents per cwt, a cost exceeding the charges. Dr. Ortego, defendant's vice president of marketing, testified that the service charge of 8 cents per cwt did not cover the actual cost of the service and that in making that charge, D.I. was only striving for some token financial recognization that these services were being provided. Be that as it may, these details with respect to all of the complained of provisions of the contracts were matters for negotiation between D.I. and its customers and any misunderstandings or differencies of opinion with respect thereto do not constitute or reflect predatory conduct.

Plaintiff regards as predatory defendant's conduct discussed, *supra*, as "Disputes With Handlers." Sec. III B(2)(a) - (f), and defendant's conduct relating to the alleged cutoff of Kinnett's and Borden's supplies discussed under III

B(4)(a) - (b). The court is convinced and finds that none of the conduct above mentioned, taken separately or collectively, rises to the level or sinks to the depth of predatory conduct. These transactions involve and represent business negotiations between business entities. It so happens that all of them with the exception of the alleged cut-off of the supplies of Kinnett and Borden were considered in detail in the case of *United States v. Dairymen, Inc., supra,* and with respect to them the court there said: "The United States claims . . . that the defendant engaged in five types of conduct during the years 1969-1973 which violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. These violations may be broadly described as follows:

> 1. Defendant's attempts to force processors to execute full supply contracts in order to eliminate competition and control prices." (Then follows a listing of types 2, 3, 4, & 5, not involved in the case *sub judice*.)

"During the period 1969-1971, defendant entered into various negotiations with its customers, which the Government characterizes as refusal to deal and related exclusionary tactics. The Government points to dealings with six processing plants, to wit: Pet Plant in Jackson, Mississippi; a Mayfield Dairy Plant in Athens, Tennessee; Sealtest Plants in Nashville, Atlanta and Chattanooga; and a Broughton Plant in Lexington, Kentucky." The court then describes what took place with respect to each of these processing plants substantially as these transactions are reviewed, *supra*. Indeed the evidence as to these transactions in the case *sub judice* consists substantially of the transcripts of the evidence adduced in the case of *United States v. Dairymen, Inc., supra*. The court then continued:

> Following the sequence of events described above, defendant's Board of Directors, in July, 1971, authorized its management to enter into written supply agree-

ments with its regular customers. These agreements would have required a handler to purchase its full supply of Grade A milk from defendant with the exception of milk then being purchased from identified nonmembers. There was also contained in the agreements a price equalization charge which imposed penalties on handlers who purchased less than 95 percent of their milk from defendant. These charges increased in proportion to the customers' purchases from defendant's competitiors.

In order to induce handlers to enter into these agreements, defendant notified [sic] them that effective September 1, 1971, milk supplied would be on a day-to-day basis, although orders would be accepted on each Friday for the following week, but the day-to-day deliveries would depend on available supplies and alternative outlets. Handlers were notified that defendant took this position, since the sales agreement had not been executed for the twelve months beginning September 1, 1971.

Defendant, in an attempt to secure the agreement of its processors to the full-supply contracts, withheld all or a substantial portion of the Grade A milk supplies from those handlers who had not signed the agreement. However, difficulties were encountered in that Holland Dairy and Borden brought suits alleging that these withholding actions violated the Sherman and Clayton Acts, and as a result received temporary restraining orders requiring defendant to discontinue its withholding actions. After these suits were brought, defendant turned to a committed-supply or stated-volumne agreement which was in effect for twelve months and which generally specified that the plants would purchase amounts in line with the amounts purchased in the previous year.

Defendant entered into 91 written supply contracts with handlers, and of these, 69 agreed to the initial

full-supply agreements, and 22 agreed to the committed-supply agreements, although defendant offered to handlers who had already executed the full-supply agreement the option of replacing these agreements with the committed-supply type of agreements. It is admitted by the United States that the 22 committed-supply agreements are not inherently predatory, but it is contended that they were part-and-parcel of defendant's attempt to monopolize.

Both the initial full-supply agreements and the committed-supply agreements contain provisions that allowed the handler to continue to receive milk furnished by active producers who were not members of the defendant. The basic difference between the two forms of contract is that the full-supply contract requires the handler to purchase all of its Grade A milk supplies from defendant, with the exception of the supplies furnished by independent producers who had been supplying milk prior to the date o the contract, whereas the committed-supply contract requires the handler to purchase a stated volume of Grade A milk from defendant, with the exception of milk furnished by independent producers under the "grandfather clause."

The court then analyzed and distinguished the predatory conduct cases relied upon by the government in that case and relied upon by the plaintiff in this case; to wit, *North Tex. Producers Assoc. v. Metzger Dairy, Inc.*, 348 F.2d 189 (5th Cir. 1965). *cert. denied* 382 U.S. 997 (1966); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F.Supp. 476 (E.D. Mo. 1965) *aff'd* 368 F.2d 679 (8th Cir. 1966); *Treasure Valley Potato Bargaining Assoc. v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974); *Maryland v. Virginia Milk Producers Assoc. v. United States*, 362 U.S. 458 (1960). The court then held:

> We do not believe that the conduct of the defendant in entering into the full-supply and committed-supply

contracts rises to the level of predatory trade practices. In so finding, we observe that the "grandfather clause" preserved the rights of the existing producers to continue to deal with the handlers. We also observe that, in many instances, the handlers were members of large national concerns with assets greatly in excess of those of the defendant, and that in many instances, these handlers had available other sources of supply to which they could readily turn, and, further, that in many instances, bargaining continued for some time over a rather protracted length of time, and that the several instances, the handlers turned to completely different sources of supply than that provided by the defendant.

D.I.'s refusal to deliver a truckload of milk to Kinnett on August 2, 1973, broadly referred to by plaintiff as a "cut-off" of milk supply, must be viewed in the context of the total factual situation outlined supra in III B(4)(a). This was not a refusal to sell milk; it was at most a refusal to sell at a price less than all other purchasers from D.I. had agreed to pay. It is true that under the written contract then in effect between plaintiff and defendant, plaintiff had a strong argument, perhaps an irrefutable argument, that the contract obligated D.I. to continue with deliveries to Kinnett at the lower price during the remainder of the contract term. It is true, however, that the contract, PX 394, contains some ambiguities in this regard, particularly the concluding two sentences in Exhibit D attached to the contract, reading as follows:

> "If any revisions are to be made in the sale of our members' product, you will be advised of such revisions in writing. Otherwise, the price arrangement hereunder is to remain in full force and effect."

D.I., however, chose not to rely on that provision, but instead to seek from all its customers written agreements to its proposed price increase. That request was made of Kin-

nett as early as July 12, 1973 and Kinnett took no definitive position with respect to that request until July 30, 1973 when, in the courier-delivered letter of that date it advised, "This is in reply to your letter of July 12, 1973 with its attached Supplemental Sales Agreement, requesting an increase in the price of milk to $8.86 per cwt. effective August 1. We regret to inform you that, on advice of our attorneys, we are not in position to agree with you on the terms of your proposed price increase. If Dairymen, Inc., or any other producer, requests an emergency Federal Market Order hearing for the purpose of presenting evidence of the increase in the cost of feed and other producer costs; we will be happy to support this move. Yours very truly, John R. Kinnett, Jr." By date of that letter, July 30, 1973, all of D.I.'s customers, save Kinnett, had agreed upon the requested price increase, and it was scheduled to take effect on the following morning. Then this belated action on the part of Kinnett jeopardized the scheduled price increase throughout the FMO-7 area. Under the circumstances then existing, including the practically unprecedented economic plight of the dairy farmers and D.I.'s binding contractual obligation not to sell to Kinnett at a lower price without giving to all other customers the opportunity to purchase at such lower price this episode is more properly regarded as a contractual or business dispute than as predatory conduct.

Similarly, we find nothing predatory on D.I.'s part in its dealings with Borden either back in 1971 when they could not see eye to eye on the advisability of written contracts, either full or committed supply, when Borden was unwilling even to discuss the matter with D.I., and D.I. had to threaten to interrupt dealings in order to get its attention, Borden then obtaining a temporary restraining order and the parties composing their differences by entering into a committed supply contract which was made a part of the court order;

or later in 1977 when we see each party again trying to outbargain the other. As outlined, *supra*, in III B(4)(b) we see Borden seeking price credits and while D.I. was considering the request and perhaps acting too slowly in Borden's judgment, Borden on March 25, 1977, at the peak of the spring surplus season, tells D.I. that it plans to replace approximately 25 percent of D.I.'s supply to Borden's Macon plant. Not liking the shortness of the three-day notice or its coming at the peak of the flush season, D.I. says in effect, if you're going to reduce us to that extent at the Macon plant, you might as well cut us off entirely at the Macon plant and at your Augusta plant. Borden then upped the ante and says in effect, well and good, we will also cut you off at our Meridian, Mississippi plant. Then it was that D.I. sought and obtained against Borden the same relief which Bordon and Holland had sought and obtained against D.I. back about 1971, namely a temporary restraining order. It should be remembered that as one witness expressed it, Borden had more bargaining power or market power than D.I., and that in fact, Borden had more assets than all dairy cooperatives combined. (PX 75 at 38-39). The question here may be who is cutting off whom. D.I. convinced a court that it was entitled to more notice before Borden could cease purchasing from D.I.

Plaintiff claims that D.I. acted in a predatory manner in "cut[ting] off Kinnett's profitable hauling operation in retaliation for Kinnett having dared to compete legitimately for supplies from individual farmers." The facts with respect to this "cut-off" are stated in III B(5). Assuming without deciding that D.I. should be held legally responsible for the actions of its predecessor, GMPCA, in terminating Kinnett's hauling contract, we find nothing predatory in such conduct. We find that the sole motive for terminating plaintiff's hauling contract was to terminate Kinnett's prac-

tically unlimited access to D.I.'s dairy farmer members which access Kinnett was obviously ready, willing and able to use, legitimately albeit, to persuade such members to desert D.I. at the expiration of their membership contracts and becomes independent producers for Kinnett. D.I. does not have, and does not claim any right to prevent such attempts at persuasion on the part of Kinnett, but at the same time, D.I. is under no obligation to provide or to continue to provide ready access for such attempts. Even if there were two possible motives for GMPCA's conduct in terminating the hauling arrangement, one lawful and the other unlawful, the law permits, if not requires, the acceptance of the lawful explanation. *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 408 (5th Cir. 1962). D.I.'s counsel poses this question: "How long would plaintiff itself have continued to employ a hauler who was attempting to convince independent producers marketing their milk directly to plaintiff to join GMPCA?"

Therefore, we have found, decided and determined that D.I.'s complained of activities, acting alone and acting in conjunction with others, when such activities are considered separately or collectively, were not competition stifling or predatory in any sense of the word, and that D.I. with respect to all of such activities is protected from liability by virtue of the C-V exemption. If we are correct in that finding and in those conclusions, this case could end here with a consequent full finding in favor of the defendant. The C-V exemption, however, does not grant cooperatives absolute immunity from liability under the antitrust laws. The Supreme Court held in *United States v. Borden Co.*, 308 U.S. 188 (1937) that a cooperative is subject to § 1 of the Sherman Act if it conspires with outside nonproducer groups to restrain trade. In the case *sub judice* we are not concerned with that exception to immunity, however, because no such

conspiracy is alleged here. The alleged co-conspirators are all Capper-Volstead farmer organizations. In *Maryland & Virginia Milk Producers, supra,* however, the Supreme Court went further and indicated that cooperatives are not exempt from Section 2 of the Sherman Act when they commit predatory practices in violation of the Sherman Act. It may be advisable therefore for us to go further and see what the result would be if we found or should have found that the complained of conduct was predatory in violation of the Sherman Act, in which event D.I. may be said to have forfeited the exemption.

In other words, let us look at D.I. as if it were not a Capper-Volstead cooperative.

Product Market. The court cannot agree with the defendant's claim that "milk is milk", and thus finds the relevant product market to be only Grade A milk. It is true that Grade A milk can be used for both fluid and manufacturing purposes; however, this fact alone does not warrant a finding of a "reasonable interchangeability of use"[34] between Grade A and Grade B milk. Whatever interchangeability exists is one-way; *i.e.*, though Grade A milk may be used for Class I, II, or III purposes, Grade B milk can never be used for Class I (fluid) purposes. We are comforted in this finding and conclusion by the fact that in the case of *United States v. Dairymen, Inc., supra,* the court, after a careful review of the authorities, concluded that while "the question is quite close and is not as clearcut as that in *Brown, supra,* Exhibit GX-930 (PX 202 in the case *sub judice*) prepared by the Farmer Cooperative Service of the United States Department of Agriculture tips the scale toward a finding that Grade A milk is the relevant product".

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[34] *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962)

Geographic Market. The second component of the relevant market is the geographic market — that physical area in which sellers of the particular product operate and to which purchasers can practicably turn for such products.[35] As for the first part of this definition, there can be argument with the fact that D.I. operates in an area much larger than that proposed by the plaintiff as a relevant geographic market; *i.e.*, the FMO-7 (Georgia) area or its alternative proposal of a nine-federal order area. The defendant markets its members' milk in the following area: Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Southern Illinois, Southern Indiana, South Carolina, Eastern Missouri, Tennessee, Virginia, and part of West Virginia. It is the second half of the geographic market definition which plaintiff urges as a problem in this case. Can the plaintiff "practicably turn" to an area outside of FMO-7 or the nine-federal order area for its milk supplies? The evidence in this case does not support a definition of the relevant geographic market as only the Georgia Federal Order (FMO-7) area or the nine-federal order area. The existence of the interstate highway system, the technological ability to preserve raw milk, and actual movements of milk all suggest a geographic market larger than the areas propose by plaintiff. Granted, it may have been somewhat more difficult for the plaintiff to obtain supplies of raw milk outside of Georgia; however, the geographic market is not defined as an area in which all sources of supply are *equally accessible*. The court is not convinced that whatever difficulty Kinnett had in obtaining supplies outside of Georgia rises to the level of an "impracticability". Consequently, the relevant geographic market in this case is the area described above; to wit, Alabama, Georgia, Kentucky, Louisiana, Mississippi, North

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[35]*Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961)

Carolina, Southern Illinois, Southern Indiana, South Carolina, Eastern Missouri, Tennessee, Virginia, and part of West Virginia. It so happens that this is the same geographic market found by the court in *United States v. Dairymen, Inc., supra*.

Additional reasons for the nonacceptability of this alternatively proposed nine-federal order area as a geographic market or geographic submarket are set forth either herein or *supra* at IV B(4). Furthermore, as was stated by the court in *United States v. Dairymen, Inc., supra*:

> Cases such as *United States v. Pabst Brewing Company*, 384 U.S. 546 (1966) *and Standard Oil Company v. United States, supra*, [337 U.S. 293 (1949)] are not of assistance in determining what constitutes a relevant submarket. Both *Pabst* and *Standard Oil, supra*, were cases brought under 15 U.S.C. Sec. 18, which refers specifically to lessening of competition in any part of the country. Under that very broad statute, the concept of relevant geographic submarkets has been developed.
>
> This Court has been unable to find any specific instances of the use of relevant geographic submarkets in cases involving 15 U.S.C. Sec. 1 and 2 and 15 U.S.C. Sec. 14, which refer generally to unlawful restraints imposed upon commerce. It would seem that 15 U.S.C. Sec. 18 was enacted to prevent the anticompetitive effect of mergers which would in any way diminish competition substantially in any part of the country, whereas the sections of the Sherman and Clayton Acts, upon which plaintiff relies, are not couched in such local and pragmatic terms.
>
> We conclude that plaintiffs' contentions regarding a relevant geographic submarket should be rejected. If they were to be accepted, logic would require that the Court examine in detail the market statistics in each and every geographic subdivision in which defendant

> competes, and might even require the establishment of many relevant geographic submarkets which could be as small as the city limits of a municipality or the boundaries of a county. While such a result would be acceptable in a suit brought under 15 U.S.C. Sec. 18, we do not believe that it would follow that it is acceptable here.

Interestingly enough, the opinion on this point in *United States v. Dairymen, Inc, supra*, is the subject of an exhaustive analysis in Brown, *Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases Arising Under Section 2 of the Sherman Act and Section 7 of the Clayton Act*,1979 Duke L. J.1152, 1183 (1979), where the author concludes as follows:

> While section 7 addresses the general lessening of competition through mergers, section 2 proscribes actual monopolies. A monopoly, by definition, must exist in one market only. It is as extensive as, and no more extensive than, that market. There is no room for leeway and surely there is no room for submarkets.

Geographic areas described in federal market orders do not commend themselves particularly as candidates for recognition as relevant geographic markets for Sherman Act § 2 cases. The marketing areas of federal orders are established for administrative purposes. Using Georgia as an example, the marketing area of the Georgia federal order is only the geographic area in which a handler like Kinnett must make a specified percentage (15 percent of total) of sales of fluid milk products before becoming subject to the regulation of the order. Regulations serve purposes and have their appropriate effect, but they do not alter economic realities. With Kinnett's plant situated as it is on the eastern bank of the Chattahoochee River, to attempt to construct as its relevant geographic market by virtue of FMO-7, the state

of Georgia alone, thus excluding therefrom, for instance, the state of Alabama, lying immediately across the river, would be to create an unrealistic and synthetic relevant geographic market. As was said in *Tampa Electric Co. v. Nashville Coal Co., supra,* at p. 331, "We do not believe that the pie will slice so thinly."

Market Power. At no time relevant to this action has D.I. possessed, acquired, or maintained the power to control prices or exclude competition in any relevant geographic market. Even if D.I. intended to acquire monopoly power in any relevant geographic market it failed to achieve its purpose because at no time did it possess the power to either control prices or exclude competition in any relevant geographic market. Nor did it ever possess such power in combination with any other organizations.

We need not and do not decide whether it had such power with respect to any geographical areas which have not been and cannot be recognized as a relevant geographic market. Its market share in any area arbitrarily selected or too narrowly drawn is beside the point. To calculate its market share in nine "selected" federal market order areas exclusive of Georgia's border states, like Alabama, North Carolina and South Carolina, is impermissible and even if Georgia (FMO-7 area) could be recognized, as it cannot, as a relevant georgraphic market, it is doubtful that D.I. enjoyed monopoly power there. True, its market share in that restricted area ranged from a high of 73 or 75 percent in 1970 to a low of 58 percent in 1979, but arrayed against that fact are potent considerations. That market share was steadily declining.[36] One reason for its decline was fixed and constant

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[36] "The significance of market power depends not only on its degree but also on its durability. Just as the degree of market power may be too trivial to warrant concern, so may it be too transitory. Substantial market power can persist only if there are significant and continuing barriers to entry." 2 P. AREEDA & D. TURNER, Antitrust Law ¶505 at 328.

"Thus, power may seem large and yet not be characterized as substantial for our purposes if it is being steadily eroded in the marketplace." 3 P. AREEDA & D. TURNER, Antitrust Law ¶ 807 at 294.

opposition to the cooperative concept by good and influential citizens like those who manned Kinnett. The contention continued that independent producers faired better than members of cooperatives. Cooperative members were not locked in. Occasionally they became persuaded to terminate their membership. For instance, during the period September 1971 until January 1972, while plaintiff and defendant were negotiating contract terms, thirteen of defendant's local members were leaving defendant to become independent producers. They had a volume large enough to supply plaintiff with approximately one-third of the amount it was then receiving from defendant. This underscores the fact that a cooperative's market power is somewhat tenuous and transitory. What power defendant had largely vanished. Plaintiff ceased purchasing from defendant. Thus, since D.I. never possessed market power in any relevant geographic market, it has not incurred liability for monopolization under Section 2 of the Sherman Act. It remains only to inquire whether it has incurred any liability for an attempt to monopolize or for a conspiracy to monopolize.

Attempt to Monopolize. An attempt charge requires proof of a specific intent to monopolize *and* a dangerous probability that the attempt will be successful in achieving the monopolization in the relevant market.[37] The specific intent required is something beyond the mere intent to do the act. It cannot even be properly characterized as an exclusionary intent. Rather, it is that particular subcategory of exclusionary intent which contemplates the use of unfair weapons or means, as opposed to mere superior skill, foresight, and industry.[38] This "illegal exclusionary intent"[39] may be in-

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[37] *In re IBM Peripheral EDP Devices*, 481 F.Supp. 965, 989 (1979).

[38] *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 140 (1960)

[39] Blecher, M., *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market"*, 38 Geo. Wash. L. Rev. 215, 217 (1969).

ferred from conduct; however, "it is ordinarily no easy task to discern whether conduct is 'legally' exclusionary or 'illegally' exclusionary[,] [t]he difficulty stem[ming] from a recognition that all businessmen, even those honestly competing, have an exclusionary intent."[40]

In the present case, the evidence does not show that any of the conduct set out in the record evidences that particular species of intent required in an attempt case. Even if it can be said that some of the defendant's conduct is susceptible to an interpretation of unlawful intent that would not require, even if it would authorize, a finding that the defendant had the specific intent to attempt to monopolize trade or commerce. Even when conduct is *equally* consistent with a lawful and unlawful intent, the actor is entitled to a presumption of lawfulness.[41] Consequently, the court finds as a fact and concludes as a matter of law that D.I. did not have the requisite intent required in an attempt to monopolize in violation of Section 2 of the Sherman Act.

This finding is sufficient to deal with an attempted monopolization charge, as the requirements for providing that offense are in the conjunctive. However, the court notes in passing that neither is there sufficient evidence to support the requirement of "a dangerous probability of success" in achieving a monopoly. Even though, in an attempt case, the power over the relevant market may be something short of monopoly power, it cannot be said in the present case that the defendant has a sufficient share of the relevant market to infer even a dangerous probability of success.

Conspiracy to Monopolize. The third charge against the defendant is that it *conspired* to monopolize in violation of

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[40]*Id.*

[41]*Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 408 (5th Cir. 1962); *see also Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1961).

Section 2 of the Sherman Act. Obviously, there is a difference in a conspiracy to monopolize and an attempt to monopolize, the conspiracy requiring some agreement, some concerted effort. However, there is an important similarity between the two charges: both involve the same specific intent — an "illegally exclusionary intent."

To establish a conspiracy to monopolize, the plaintiff must prove by a preponderance of the evidence: that there was a conspiracy; that the object of the conspiracy was to achieve monopoly power; and that there was a specific intent, an intent in the onerous sense to injure the plaintiff and injure competition as well.[42]

Whether or not any conduct, several or joint, might make the defendant liable under the monopoly charge, where specific intent is not required, such conduct cannot result in liability for conspiracy to monopolize, where this specific intent *is* required.

Considering all of the evidence in the present case, the court is not persuaded that the defendant has this intent requisite to be found to have conspired to monopolize in violation of Section 2.

Thus viewing the defendant as a non Capper-Volstead organization the result would be the same.

CONCLUSION

Fairdale Farms, Inc. sheds light upon the meaning of predatory when it says that "a cooperative may neither acquire nor exercise monopoly power in a predatory fashion by the use of such tactics as picketing and harassment . . . boycotts . . . coerced membership . . . and discriminatory

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[42]*Old Homestead Bread Co. v. Continental Baking Co.*, Civil No. CA 844 (D. Colo. 1971) (ABA Antitrust Section, Antitrust Civil Jury Instructions, p. 88 (1972)).

pricing. Neither may it use its legitimately acquired monopoly power in such a manner as to stifle or smother competition." In the present case we have heard nothing of coerced membership, nor of picketing and harassment, nor of boycotts, nor of discriminatory pricing, even though the defendant operates a processing plant in Columbus, Georgia, in direct competition with Kinnett. The evidence of "such tactics" is conspicuously absent.

The plaintiff contends for predatory conduct in this case only in the looser or less pejorative sense of the word. For instance at pretrial plaintiff's counsel stated: "If we're talking about predatory conduct in that sense, purposeful conduct intended to kill off a competitor or to maim him severely so as to affect his ability to compete, I would say to you frankly that I don't really think we're talking about that type of situation here. Now some people have defined predatory in a less nefarious sense — any act which was intended to acquire or maintain monopoly power . . . . We are not charging in this case that D.I. in essence sought to eliminate Kinnett. We are not taking that position. There is no strong evidence to support that assertion . . . . It's not what I call a predatory case . . . . The heart of our case is what I call this network of arrangements with the Georgia Super Pool, with ARSPC and with Great Lakes and Southern. These are what we contend are a series of artificial arrangements which have restricted . . . . When you put all those together, you've got the supply of milk in the eastern southern United States tied up. Now we think it's through that network that they have been able to get this premium price . . . . The closest we came to predatory is conduct on the part of Dairymen . . . in the summer of 1973 [when] Dairymen . . . refused to sell Kinnett unless he would agree to rewrite an existing contract at still higher prices. Finally . . . the refusal to permit Kinnett to haul milk of its D.I. members — an act

there which shows a purposeful intent in this case to hurt Kinnett because they let other processors continue to haul Dairymen's milk."

With predation eliminated, largely by admission, and entirely by evidence and the lack thereof, and there being no conscious intent to stifle or smother competition or to exclude others from the market place, *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951); *In re IBM Peripheral EDP Devices, etc.*, 481 F.Supp. 965, 1010 (N.D. Cal. 1979), plaintiff is relegated to its reliance upon the network of arrangements with other cooperatives as somehow violating the Sherman Act. This network of arrangements is authorized by Section 6 of the Clayton Act and by the Capper-Volstead Act. *Fairdale Farms, Inc., supra*. If this authorization is to be taken away it should be taken away by the Congress which granted it and not by the courts.

D.I. has not violated Section 1 or Section 2 of the Sherman Act:

Not Section 1 because Capper-Volstead grants full immunity to Capper-Volstead organizations acting separately or collectively in fixing prices and in conducting other marketing activities, absent agreements with outsiders. *Fairdale Farms, Inc. v. Yankee Milk, Inc., supra*;

Not Section 2 because Capper-Volstead grants full immunity as to Section 2 violations, absent agreements with outsiders and absent predatory conduct in violation of the Sherman Act. And even if Capper-Volstead did not apply D.I. did not monoplize, lacking monopoly power in the relevant geographic market; and did not attempt to monopolize, lacking specific intent and dangerous probability of success; and did not conspire to monopolize, lacking specific intent. *Fairdale Farms, Inc. v. Yankee Milk, Inc., supra*.

There being no monopolization, there is no monopoly increment in defendant's pricing as alleged; and therefore, there can be no recovery of alleged damages as a result of the pricing practices.

Likewise since the termination of plaintiff's hauling arrangement was a fully justified business transaction on the part of defendant's predecessor and was intended to protect the legitimate interests of its members, there can be no recovery of the alleged loss of hauling profits.

Verdict and judgment are being prepared in accordance herewith.

SO ORDERED, this 10th day of March, 1981.

W. A. Bootle
Senior United States District Judge

APPENDIX C.

Judgment.

United States Court of Appeals for the Eleventh Circuit.

Kinnett Dairies, Inc., Plaintiff-Appellant, versus Dairymen, Inc., Defendant-Appellee.

No. 81-7308. D.C. Docket No. CIV-1701-COL.

Filed at 4:45 p.m., October 31, 1983, U.S. District Court.

Filed: October 24, 1983, U.S. Court of Appeals, Eleventh Circuit.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to the heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 19, 1983

A True Copy

Attested:

Clerk, U.S. Court of Appeals,
Eleventh Circuit

By:/s/ Carol Corp
Deputy Clerk Atlanta, Ga.

MORGAN, Senior Circuit Judge, dissenting.

ISSUED AS MANDATE: Oct. 24, 1983

This judgment, issued as mandate, is made the judgment and order of the District Court.

This 31st day of October, 1983.

/s/ .....
UNITED STATES DISTRICT JUDGE

APPENDIX D.

Decision.

United States of America, Plaintiff-Appellant, Cross-Appellee, v. Dairymen, Inc., Defendant-Appellee, Cross-Appellant. Nos. 79-3438, 79-3439.

United States Court of Appeals, Sixth Circuit.

Argued June 12, 1981.

Decided Sept. 21, 1981.

Rehearing Denied Dec. 22, 1981. Rehearing and Rehearing En Banc. Denied Feb. 10, 1982.

The United States brought action alleging that agricultural cooperative marketing association of dairy farmers had attempted to monopolize the market in grade A milk in the Southeastern United States and had violated Clayton Act by requiring its milk haulers to enter exclusive hauling contracts. The United States District Court for the Western District of Kentucky, Charles M. Allen, Chief Judge, dismissed portion of action alleging the attempt to monopolize and held that cooperative had violated the Clayton Act and the United States and the cooperative appealed. The Court of Appeals held that: (1) the action must be remanded to district court to determine whether cooperative used its full supply and committed supply contracts and exclusive hauling contracts with specific intent to monopolize and whether there were less exclusionary methods for cooperative to have achieved its legitimate goals, and court should determine relevant geographical submarkets and whether supply contracts foreclosed substantial share of market from competitors and tended to create monopoly in line of commerce in violation of Clayton Act, and (2) evidence supported finding that exclusive hauling contracts and pooling practices of cooperative violated the antitrust laws.

Affirmed in part, reversed in part and remanded.

Nancy C. Garrison, U. S. Dept. of Justice, Robert B. Nicholson, Antitrust Div., Appellate Section, Barry Grossman, Washington, D. C., for the U. S.

D. Paul Alagia, Barnett & Alagia, Joseph M. Day, Ronald L. Gaffney, Louisville, Ky., Morton Hollander, William A. Carey, John F. Sherlock, III, William S. Glading, Barnett, Alagia & Carey, Washington, D. C., for Dairymen, Inc.

Before JONES, Circuit Judge, CECIL, Senior Circuit Judge and BERTELSMAN,* District Judge.

PER CURIAM.

The United States appeals from a judgment dismissing that portion of its action which alleged that Diarymen, Inc. (D.I.) attempted to monopolize the market in Grade A milk in the Southeastern United States. D.I. appeals from that portion of the district court's judgment which held that it violated Section 3 of the Clayton Act by requiring its milk haulers to enter exclusive hauling contracts.

D.I. is an agricultural cooperative marketing association of dairy farmers which markets Grade A milk in the Southeastern United States. The Government alleged that D.I. used its market power to attempt to monopolize the market in Grade A milk. Its complaint asserted that D.I.: (1) forced milk processors to execute full supply and committed supply contracts to eliminate competitors from the market in violation of Section 3 of the Clayton Act; (2) imposed exclusive dealing contracts on its milk haulers; (3) foreclosed competition by acquiring customers from its competitors; (4) pooled milk without regard to the profits or losses which

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*Honorable William O. Bertelsman, United States District Court for the Eastern District of Kentucky, sitting by designation.

resulted from pooling; and (5) used restrictive membership agreements. The Government sought to enjoin D.I. from continuing these practices.

The district court found that D.I. entered into 91 full supply or committed supply agreements with milk processors.[1] In order to secure these agreements, D.I. threatened to withhold milk from several processors.[2] D.I. also required milk haulers in Indiana and in Nashville, Tennessee, to haul milk for D.I. exclusively. The reason D.I. gave for imposing exclusive hauling contracts was to prevent the comingling of its members' milk with lower quality milk.

The district court dismissed the attempt to monopolize charge because the Government failed to prove that D.I.'s anticompetitive practices rose to the level of predatory trade practices and because the Government failed to prove that there was a dangerous probability that a monopoly would result from D.I.'s practices. It found that D.I.'s exclusive hauling contracts were over restrictive and enjoined their use. The court also found that D.I.'s membership agreements, which required those joining the cooperative to remain members for two years, were not unreasonable. Finally, the district court found that D.I.'s pooling practices in Mississippi were illegal, but it did not issue an injunction because there was no probability that these practices would recur.

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[1]Full supply contracts required processors to purchase all their Grade A milk from D.I. except for the amount of milk furnished by independent producers prior to the date of the contract. The committed supply contracts required processors to purchase the same amount of milk from D.I. as they had in the past. These contracts also contained "price equalization charges" which penalized processors who purchased less than 95% of their milk from D.I..

[2]These threats were unsuccessful against two dairies which filed private antitrust actions and who were granted temporary restraining orders which prevented D.I. from withholding milk.

In this appeal the Government contends that the district court erred in holding that the Capper-Volstead Act, 7 U.S.C. §§ 291, 292, and Section 6 of the Clayton Act, 15 U.S.C. § 17, exempt agricultural cooperatives from liability for attempts to monopolize unless their anticompetitive conduct is deemed "predatory." We agree.

The Capper-Volstead Act[3] was intended to permit agricultural producers to join together to process, prepare, and market agricultural products without fear of prosecution under the antitrust laws. It permits an agricultural cooperative to be formed solely to fix the price at which its members products are sold. *Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Coop.*, 413 F.Supp. 984 (N.D.Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978) *cert. denied*, 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979). Two or more cooperatives can voluntarily join together solely for the purpose of setting uniform prices for their members. *Id.; Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.) *cert. denied*, 419 U.S. 999, 95 S.Ct. 314, 42 L.Ed.2d 273 (1974). As a result, an agricultural cooperative can willfully attain a monopoly through the voluntary enrollment of its members, or through a voluntary combination with other cooperatives. The mere accretion of monopoly power through voluntary combination is immunized by the Capper-Vol-

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[3]Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, provides in pertinent part:

> Persons engaged in the production of agricultural products as . . . dairymen . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

stead Act.[4] *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980).

The use of the term "predatory practices" in cases construing the Capper-Volstead Act is intended to distinguish monopolies acquired through anticompetitive practices from lawful accretions of market power willfully created through the voluntary enrollment of members of cooperatives. In *Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960), the Supreme Court reversed the district court's dismissal of an action under Section 2 of the Sherman Act and stated that the Capper-Volstead Act "did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." 362 U.S. at 467, 80 S.Ct. at 854. The Second Circuit has also cautioned that "a cooperative may neither acquire nor exercise monopoly power in a predatory fashion by the use of such tactics as picketing and harassment . . . boycotts . . . coerced membership . . . and discriminatory pricing. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, *supra* at 1044.

In this case the district court set too high a burden on the Government when it required the Government to show that D.I.'s practices rose to the level of predatory practices, *i. e.*, anticompetitive practices without any business justification. The offense of attempt to monopolize requires only that the defendant has engaged in anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153, 72 S.Ct.

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[4]This immunity is subject to the Secretary of Agriculture's authority to order a cooperative association to cease and desist from monopolization. 7 U.S.C. § 292.

181, 186, 96 L.Ed. 162 (1951); *see also Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 85 (2d Cir. 1981); *Kearney and Trecker Corp. v. Giddings & Lewis, Inc.*; 452 F.2d 579, 598 (7th Cir. 1971) *cert. denied*, 405 U.S. 1066, 92 S.Ct. 1500, 31 L.Ed.2d 796 (1972). The district court did not determine whether D.I. used its full supply and committed supply contracts and exclusive hauling contracts with the specific intent to monopolize, and it is necessary to remand this case for that determination.

Although there is evidence of economic justification for the use of full supply and committed supply contracts, the question of intent is paramount. An anticompetitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal. On remand the district court should determine whether there were less exclusionary methods in which D.I. could achieve its legitimate goals. However, the most important inquiry is whether these contracts were intended to stifle competition or were intended to meet legitimate business purposes.

The district court rejected the Government's proposed geographic submarkets because it believed this type of analysis was not required under Section 2 of the Sherman Act, unlike the inquiry made under Section 7 of the Clayton Act. However in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173, 68 S.Ct. 915, 936–937, 92 L.Ed. 1260 (1948), the Supreme Court stated that Section 2 of the Sherman Act "condemns monopoly of 'any part' of trade of commerce. 'Any part' is construed to mean an appreciable part of interstate or foreign trade or commerce." In addition, in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 251, 79 S.Ct. 245, 251, 3 L.Ed.2d 270 (1959) the Supreme Court specifically noted that the

Sherman Act is applied to "localized geographic area[s]." On remand the district court should determine the relevant geographic submarkets on the basis of commercially significant areas in which D.I. operated and in which D.I.'s customers could turn to other suppliers. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961). Once this factual determination is made it will be possible to evaluate whether D.I. ever achieved a dangerous probability of success of monopoly in any significant market.

After the district court determines the relevant geographic submarkets it will be possible to determine whether the full and committed supply contracts used by D.I. foreclose a substantial share of the market from its competitors[5] and "tend[s] to create a monopoly in any line of commerce" in violation of Section 3 of the Clayton Act.

There is no merit to D.I.'s contentions that the district court erred in holding that D.I.'s exclusive hauling contracts and pooling practices violated the antitrust laws.

AFFIRMED in part, REVERSED in part and REMANDED.

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[5]We note that in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 329, 81 S.Ct. 623, 629, 5 L.Ed.2d 580 (1961), a case which involved Section 3 of the Clayton Act, the Supreme Court stated:

> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relevant strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.

APPENDIX E.

Findings of Fact and Conclusions of Law.

In the United States District Court for the Western District of Kentucky at Louisville.

United States of America, Plaintiff, v. Dairymen, Inc., Defendant. Civil Action No. C 7634 A.

On April 5, 1978, this Court entered a judgment and on June 21, 1978 a supplemental judgment which dismissed that portion of the plaintiff's complaint which alleged that Dairymen, Inc., (D.I.) attempted to monopolize the market in Grade A milk in the Southeastern United States. Those judgments also held that D.I. had violated Section 3 of the Clayton Act by requiring its milk haulers to enter into exclusive hauling contracts. The judgments also dismissed that portion of the plaintiff's complaint which alleged that the full supply and committed supply contracts used by D.I. foreclosed a substantial share of the market from its competitors and tended to create a monopoly in violation of Section 3 of the Clayton Act.

On appeal, the United States Court of Appeals for the Sixth Circuit, in its per curiam opinion entitled *United States v. Dairymen, Inc.*, 660 F.2d 192 (1981) reversed that part of this Court's judgment which had dismissed the attempt-to-monopolize charge because of this Court's belief that the Government had failed to prove that D.I.'s anticompetitive practices rose to the level of predatory trade practices, and because the United States failed to prove that there was a dangerous probability that a monopoly would result from D.I.'s practices. See p. 193.

The Court of Appeals affirmed that portion of this Court's decision which found that D.I.'s exclusive hauling contracts were overly restrictive, and also found that D.I.'s pooling practices in Mississippi were illegal. See pp. 193-194.

In its opinion, the Court of Appeals states that this Court erred when it held that the Capper-Volstead Act, 7 U.S.C. Secs. 291, 292 and Section 6 of the Clayton Act, 15 U.S.C. Sec. 17, exempted agricultural cooperatives from liability for attempts to monopolize unless their anticompetitive conduct was deemed predatory. See p. 194.

The appellate court's opinion goes on to hold that the burden on the Government is to show only that the defendant had engaged in anticompetitive conduct with a specific intent to monopolize, and that there was a dangerous probability that the attempt would be successful. See p. 194.

The Sixth Circuit went on to state that "(t)he district court did not determine whether D.I. used its full supply and committed supply contracts and exclusive hauling contracts with the specific intent to monopolize, and it is necessary to remand this case for that determination." See p. 195. The Sixth Circuit went on to state that ". . . the most important inquiry is whether these contracts were intended to stifle competition or were intended to meet legitimate business purposes."

In addition, the Court of Appeals directed this Court to ". . . determine the relevant geographic submarkets on the basis of commercially significant areas in which D.I. operated and in which D.I.'s customers could turn to other suppliers." (Citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)). As the Court of Appeals pointed out "(o)nce this factual determination is made it will be possible to evaluate whether D.I. ever achieved a dangerous probability of success of monopoly in any significant market." See p. 195.

The Court then pointed out that "(a)fter the district court determines the relevant geographic submarkets it will be possible to determine whether the full and committed supply

contracts used by D.I. foreclose a substantial share of the market from its competitors and 'tend(s) to create a monopoly in any line of commerce' in violation of Section 3 of the Clayton Act." (Footnote deleted) See p. 195. The Court of Appeals also stated on p. 195 that this Court "rejected the Government's proposed georgraphic submarkets because it believed this type of analysis was not required under Section 2 of the Sherman Act, unlike the inquiry made under Section 7 of the Clayton Act." The court then went on to state "(h)owever in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173, 68 S.Ct. 915, 936-937, 92 L.Ed. 1260 (1948), the Supreme Court stated that Section 2 of the Sherman Act 'condemns monopoly of "any part" of trade of commerce. "Any part" is construed to mean an appreciable part of interstate or foreign trade or commerce. In addition, in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 251, 79 S.Ct. 245, 251, 3 L.Ed. 2d 270 (1959)the Supreme Court specifically noted that the Sherman Act is applied to 'localized geographic area(s).' "

It is apparent from the decision of the Sixth Circuit that this Court should attempt to define a relevant geographic market along with relevant geographic submarkets, and that the test used under Sec. 3 of the Clayton Act by inference is deemed by the appellate court to be interchangeable with the test to be used in connection with Sec. 2 of the Sherman Act.

The United States contends that the relevant submarket is to be found in an area comprising the States of Kentucky, Tennessee, Georgia, Mississippi and Louisiana. The defendant contends, on the other hand, that the relevant geographic submarket contains not only the states proposed by the Government but the four milk commission states of Virginia, North and South Carolina and Alabama. The Gov-

ernment contends that the milk commission states, by virtue of their regulations pertaining to the relations between producers and handlers, effectively reduced or effectively barred the produces in those states from competing in the areas which the Government contents constitutes the relevant geographic market. Those regulations provide, in substance, for close relationships between handlers and producers and fix certain percentages of their milk supplies which handlers must accept from producers once the parties have agreed to enter into commercial relationships. Those relationships and regulations will be set out in detail in the appendix to this opinion.

Contrary to the Government's position, the testimony does reflect that handlers in the Government's proposed geographic submarket purchased milk from the producers in the four milk commission states. Also, it is true that handlers in the Southeastern territory purchased milk produced in Wisconsin, Minnesota, and other areas outside the Southeastern territory, and must, in fact, do so in times of peak demand and low supply. However, the Appellate Court has specifically directed this Court to use the broad test set out in *United States v. Paramount Pictures, Inc., supra,* and *International Boxing Club of New York, Inc. v. United States, supra.* This results in the Court, in essence, being authorized to find a relevant geographic submarket which may be considerably smaller in area than the relevant market as a whole. See *United States v. Empire Gas Corporation,* 537 F.2d 296 (8th Cir. 1976).

Using this approach and taking into consideration the fact that it is more expensive for handlers in the Southeastern states to purchase milk produced in such areas as Minnesota and Wisconsin, and therefore it is more practical to purchase milk produced in nearby areas, we believe that the relevant submarket should be considered as comprising the states of

Kentucky, Tennessee, Georgia, Mississippi, and Louisiana.

While the states of Virginia, North and South Carolina, and Alabama are contiguous to the five states which we believe constitute the relevant geographic submarket, and while there is substantial evidence that a portion of the Grade A milk purchased in the relevant submarket comes from the contiguous states, there are no hard statistics showing how much is so purchased. Also, because of the presence of State Dairy Commissions which regulate the relationships between cooperatives and the processors in a different fashion than do the Federal Order areas, such differences in processors and regulations would it seems inhibit, to some extent, the availability of milk in those states for purchase by processors in the relevant submarket.

Also a considertion is the fact that all of the brush fire incidents concerning which the Government complains took place in the relevant submarket, and that the pooling practices complained of took place in Mississippi and that some of the hauling contracts took place in some of the relevant submarkets. In short, the five-state submarket appears to be the area where the Government has concentrated most of its evidence to show the attempt to monopolize and the alleged violation of Section 3 of the Clayton Act.

The Government contends that the proper measure of the relevant geographic submarket is milk pooled on that market, whereas D.I. claims that the relevant measure is the milk produced in that area. In this connection, the opinion of the Court of Appeals gives no clue as to what the current holding of this Court should be. In its original opinion, this Court found that the correct measure is the milk produced rather than amount pooled. Since the Appellate Court did not mention or refer to this measure in its opinion, the Court might be warranted in assuming that its original determination was correct. However, with no reference to this im-

portant question to guide the Court, the Court will, out of an abundance of caution, re-analyze the arguments of the parties.

Simply stated, the Government contends that milk which is pooled is, in fact, milk which can be purchased by handlers in the territories where the milk is pooled. The subject of pooling is rather complex. As the Court understands it, in the states which constitute the relevant geographic submarket as found by this Court, the Federal Marketing Orders regulate the plants of the milk handlers. Any milk handler who makes about 15% of his total fluid milk sales within the Federal Orders area becomes fully regulated by the Order. His plant then becomes what is known as a "Fully Regulated Pool Plant" or "Pool Distributing Plant,"or under certain conditions "Pool Supply Plant." These handlers must pay to the producers the blend price as computed by the Government, and must account to what is known as the "Federal Order Pool" at class prices. The cooperatives and producers, in turn, my divert Grade A milk pursuant to the Federal Marketing Orders from a pool plant without that plant having physically received the milk, the diversion going to unregulated plants or other Federal Order Pool plants. This milk is treated as if it had actually been received in the pool plant, even though shipped to another plant, by shipping to an unregulated plant or pool plant regulated under another Order. That milk which is diverted qualifies as producer milk and remains pooled on that Federal Order regulating the plant from which diverted, and that milk is entitled to receive the Order plant price.

More specifically, it appears that 16.1% of the milk pooled on the Georgia Federal Order 7 was produced on farms located in Alabama, Tennessee and North and South Carolina. This was for the year 1973, whereas in 1971, some 36,461,000 lbs. of milk pooled on the Georgia Order was

produced in the State of Virginia. This evidence and other evidence of pooling within the Southeastern territory. D.I. contends that the amount of milk pooled on a Federal Order is not an accurate reflection of the amount of milk actually delivered or sold to the regulated handlers located in the particular Federal Order area. The question then arises as to whether the amount of milk produced within a particular Federal Order area accurately reflects the amount of milk received by handler from producers.

While it is apparent that handlers located in the relevant geographic submarket not only purchase milk produced in their particular states but also purchase milk which is pooled on various Federal Orders, it would appear at first blush that the fair way to measure D.I.'s share of the submarket and then weigh the amount of milk pooled on the Federal Order located in that state and sold to handlers. However, the Government has been unable to furnish any statistics which would accurately establish what portions of handlers' milk purchases are made from milk which has been pooled on Federal Orders located in the particular states in which the milk handlers are located.

This being so, the Court must follow the reasoning adopted by the District Court in the case of *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982) where that court held that plaintiff's "statistical evidence was not sufficiently well defined to support its claims of actual and attempted monopolization." See 1192. In that case the Appellate Court noted that the defendants had disputed the sufficiency of plaintiff's market definition and share data, arguing that it fails to account for milk which is pooled on one order but actually sold in another, or for certain unregulated milk supplies not reflected in the pooling statistics or for other milk movements between orders and across boundaries variously proposed as market definitions by

plaintiff. See 1192.

We note that the Appellate Court held that this finding was not clearly erroneous and, therefore, did not decide the issue of whether the District Court would have been clearly erroneous had it accepted the market definition and share data presented to it by the plaintiff. However, we believe that our conclusion that the Government has produced insufficient evidence to allow this Court to find the amount of milk pooled, together with the amount of milk produced in the relevant geographic submarkets, is a logical finding.

Reviewing the statistics for the relevant geographic submarkets, which we note in passing is the market where defendant's market share is the greatest, we find that for the year 1971, D.I.'s share of the milk produced was as follows:

Kentucky	Tennessee	Georgia	Louisiana	Mississippi
57.6%	72.5%	65%	41.2%	61.3%

The average share of the market possessed by D.I. in 1971 was 60.1%. In the years since 1971, D.I.'s share of the milk produced in these states has declined as shown by the following table.

1972 — 57.9%;	1977 — 52.6%;
1973 — 56.7%;	1978 — 51.8%;
1974 — 54.2%;	1979 — 51.9%;
1975 — 52.1%;	1980 — 49.0%;
1976 — 53.5%;	1981 — 48.6%.

An attempt to monopolize claim such as the Government makes here generally requires a specific intent to monopolize, and a showing of a dangerous probability of success, the latter of which is also examined by reference to the offender's share of the relevant market. See *Alexander v. National Farmers Organization, supra,* at 1181.

In determining whether or not the acts of D.I. reveal a specific intent to monopolize, the Court must consider the testimony as a whole and the brush fire incidents, not as separate compartmentalized incidents, but as part of the whole picture of defendant's dealings and allegedly anti-competitive practices. See *United States v. Dairymen, Inc., supra*, and *Alexander v. National Farmers Organization, supra*. Using this approach, the preponderance of proof as found in the original findings of fact and conclusions of law was to the effect that D.I. had resorted to anticompetitive pooling practices in Mississippi. There was also the finding that D.I. had resorted to illegal hauling contracts in Indiana, which is not a part of the relevant submarket, and In Tennessee, which is. When these exclusionary and anticompetitive practices are considered, in conjunction with the brush fire incidents, and D.I.'s insistence upon either committed or full-supply contracts, and where such insistence was accompanied by threats to cutoff the milk supplies of the processors and by statements of D.I. officials to the effect that it had been successful in foiling N.F.O.'s attempt to sell milk at competitive prices in Nashville and Atlanta, we reach the conclusion that the Government has shown a specific intent to monopolize.

In reaching this conclusion, we are mindful of the fact that there was no proof of picketing, harassment, boycotts, or discriminatory pricing. We are cognizant also of the fact that the conduct of D.I. in no way was as egregious as that of the defendants in *Otto Milk Company v. United Dairy Farmers Cooperative Association*, 388 F.2d 789 (3rd Cir. 1967) and *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), cert. denied, 382 U.S. 977 (196), or in *Alexander, supra*. In short, the evidence as to specific intent is rather closely balanced, but the Court finds that the balance tips slightly in favor of the

United States.

Coming now to the question of whether or not the Government has proved that there was a dangerous probability of success, we note that the courts have often discussed the share of the market which must be possessed by a defendant before it can be found that the defendant possessed either a monopoly or a dangerous probability of success of establishing a monopoly. In the Supreme Court case of *Farmer's Guide Publishing Company v. Prairie Farmer Publishing Company*, 293 U.S. 268 (1934), the court held that it was error for the district court to direct a verdict for the respondents under Sections 1 and 2 of the Sherman Act, where the proof established that the respondent's share of the market during a five-year period ranged from 44.7% to 66.93%.

In *Bergjans Farm Dairy Company v. Sanitary Milk Producers*, 241 F.Supp. 476 (E.D. Mo. 1965), aff'd 368 F.2d 679 (8th Cir. 1966), it was held that a 55% share of the relevant geographic submarket constitutes sufficient evidence to allow the case to be submitted to the jury in conjunction with much other evidence revealing coercive and predatory conduct by the defendant.

On the other hand, it has been held that where a defendant has a share of the market which is declining over the years, that this is to be considered as evidence demonstrating the improbability of success of an intent to monopolize. See *Lektro-Vend Corporation v. Vendo Company*, 660 F.2d 255 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982).

Applying these rather elastic principles to the case at bar, we note that D.I.'s share of the relevant geographic submarket was 60% in 1971 and that it decreased the years immediately following 1971 until 1975 when it was 52.1%.

In the case of *Broadway Delivery Corporation v. United Parcel Service of America*, 651 F.2d 122 (2nd Cir. 1981),

at pp. 126-29, the court points out that market share evidence is significant as an indicator of either the presence or absence of monopoly power, but that its true significance can only be determined after careful analysis of the particular market, and that sometimes it may be useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power. See p. 129.

In short, there is no *per se* rule which holds that a certain percentage of the relevant market dictates a finding of monopoly power or a lack thereof.

The courts have had great difficulty in articulating the criteria by which a dangerous probability of success is to be measured. In *United States v. Empire Gas Corporation*, 537 F.2d 296 (8th Cir. 1976) the court, in discussing the dangerous probability of success requirement, held that there was no such probability, assuming that the defendant had about 50% of the market in dollar sales in one area and 47% in another, where there was insufficient proof that competitors of the defendant raised or fixed prices because of defendant's threats; stopped soliciting the defendant's customers; or decided not to enter the LP business; or decided to leave the business on account of defendant's actions. See p. 305

Analysis of the *Empire Gas, supra*, case tends to show that the court was basically concerned with whether or not there was a dangerous probability that the defendant could control prices in the relevant markets. Also, the court was concerned with whether or not the defendant had the power to effectively exclude competitors from the market.

Applying these principles to the proof in the case at bar, the evidence does not show conclusively that D.I. was able

to make its competitors raise or fix prices. In fact the proof reveals that N.F.O. was selling at prices lower than D.I. and continued to do so.

With reference to the power to exclude competitors from the relevant market, the weight of evidence is to the effect that, although D.I. was successful in obtaining committed and full-supply contracts from handlers whose purchases approximated almost 50% of the sales made to handlers in the relevant submarkets, D.I. still lacked the power to exclude N.F.O. from competing in the relevant submarkets. This is reflected by the evidence that Sealtest-Chattanooga received all of its supplies from N.F.O. after defendant withheld its supply from its plant.

The power of D.I. to control prices and exclude competitors was also limited by the fact that many of the processors were strong national concerns with assets in excess of those possessed by D.I. Such processors were not easily intimidated by D.I.'s actions as related in the Court's discussion of the brush fire incidents in its previous opinion.

On balance, we reach the conclusion that the *Government has failed by a narrow margin to meet its burden of proof with reference to the probability of success factor*. Had the processors and handlers been less powerful in their own right, the conclusion of the Court might have been different, but their power, plus the undisputed proof that D.I.'s share of the market declined after 1971, plus the other criteria which we have discussed, would seem to justify the holding that the United States has failed to prove a violation of the attempt to monopolize provisions of Section 2 of the Sherman Act.

We come now to the question of whether or not the Government has proved a violation of Section 3 of the Clayton Act, 15 U.S.C. Sec. 14. That section provides as

follows:

> *Sale, etc., on agreement not to use goods of competitor*
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

In a scholarly opinion in the case of White *and White v. American Hospital Supply*, 540 F.Supp. 951 (W.D. Mich. 1982), at pp. 1026-30, District Judge Hillman discusses in some detail the meaning of Section 3 of the Clayton Act. As he points out, it promotes competitive distribution of products and condemns anticompetitive exclusive dealing arrangements and requirements contracts. As he further points out requirement contracts are not *per se* illegal and must, therefore, be tested under a Rule of Reason analysis. See p. 1027. He then goes on to point out that the effect of an exclusive dealing arrangement (in this case a requirements contract) may be measured through either of two approaches: a quantitative or a qualitative approach. See *Standard Oil Company Stations v. United States*, 337 U.S. 293 (1949) (hereinafter *Standard Stations*).

The Supreme Court measured the anticompetitive dealing arrangements of Standard Oil by reference to the percentage of the market foreclosed by the requirements contract, and the Supreme Court held that a forclosure of 6.7% of the market was sufficient to warrant a finding that Standard Oil had violated Section 3 of the Clayton Act. That approach has been widely criticized. See *Lockhart and Sacks*, "The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act," 65 Harv.L.Rev. 913 (1952); *Schwartz*, "Potential Impairment of Competition; The Impact of *Standard Oil of California v. United States* on the Standard of Legality Under the Clayton Act," 98 U.Pa.L.Rev. 10 (1949). See 540 F.Supp. at 1028.

Notwithstanding that criticism, the quantitative approach was applied in the case of *Mytinger and Casselberry, Inc. v. FTC*, 301 F.2d 534 (D. C. Cir. 1963).

In *Tampa Electric Company v. Nashville Coal Company*, 365 U.S. 320 (1961), the Supreme Court, after holding that the line of commerce and area of effective competition must be carefully selected, stated that ". . . the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market." See p. 328. The Court noted at pp. 328-29 that in *Standard Stations, supra*, there are 5,937 gasoline stations involved which constituted 16% of the retail outlets in the relevant market which were covered by over 8,000 contracts, together with a great volume of products involved. The Court then went on to note that in *Standard Stations*, the ". . . affected proportion of retail sales was substantial." See p. 329. It then went on to distinguish *Standard Stations*, from *United States v. Columbia Steel Company*, 334 U.S. 495 (1948), where the Court found that there was no violation where the seller's share of the relevant market was 3%.

In *Tampa Electric, supra,* the Court points out that to determine substantiality in a given case, "it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relevant strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." See p. 329. The Court also stated that " . . . a mere showing that the contract itself only involves a substantial number of dollars is ordinarily of little consequence."

In the latter part of *Tampa Electric,* the Supreme Court points out that requirements contracts may be of economic advantage to buyers as well as sellers, and that there was no seller with a dominate position in the market or myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts as in *Standard Stations, supra,* or a plainly restrictive typing arrangement as in *International Salt Company v. United States,* 332 U.S. 392 (1947). See p. 334.

It is obvious from the recitation of the principles set out in *Tampa Electric* and *Standard Stations,* that the facts in the case at bar are not closely analogous to those cases, since in *Tampa Electric* their electric contracts were less than 1% of the total market production of 700 coal producers who could effective compete in the relevant market. In the case at bar, D.I. by contrast had a market share in the relevant submarket of more than 50%, and was, therefore, very much nearer to dominance than was Nashville Coal Company in *Tampa Electric, supra.* In fact, D.I.'s share of the relevant submarket during the period in question in this action is greatly in excess of the relevant market share of Standard Oil in *Standard Stations, supra.*

In the case of *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3rd Cir. 1975), the court held that if the non-Holiday Inn clause entered into between Holiday Inn and its franchisees foreclose competitiors of Holiday Inns from 14.7% of the market, that clause might well offend the limitations which the Clayton Act places on exclusive contracts. The Appellate Court, however, made it clear that in deciding whether an exclusive dealing contract violates Section 3 of the Clayton Act, the judiciary must take into account the economic justification for the arrangements, citing *Tampa Electric Company v. Nashville Coal Company, supra.* See 521 F.2d at p. 1251.

Also, *Holiday Inns, supra,* makes it clear the trial could should consider " 'the probable immediate and future effects which preemption of that share of the market might have' within the competitive context of that industry," and also must consider the relative strength of the parties. See p. 1252.

As noted previously, there are sound business reasons for the execution of committed and full supply contracts of one year's duration. In fact the Government has consented to such provisions in the case of *United States v. Associated Milk Producers,* 394 F.Supp. 29 (W.D. Mo. 1975).

As we have previously noted, the processors and dealers with whom D.I. often dealt were of equal or greater economic strength than D.I. Also, because of the cyclical nature of the milk market, there are sound business reasons for entering into full-supply contracts which cover a period of a year. Even though there are sound and legitimate reasons for enteing into full-supply or committed supply contracts, and even though those contracts contain grandfather clauses, the fact remains that they were contracts which D.I. obtained at a time when it possessed 59.5% of the relevant submarket and the contracts themselves controlled the purchase of al-

most 50% of the Grade A milk marketed in the relevant submarkets. We believe that the timing of the execution of these contracts, occurring as they did when D.I. was at the peak of its market share power, renders them in violation of Section 3 of the Clayton Act, even though that would not have been had D.I.'s share of the relevant submarket been significantly less.

We note that *Tampa Electric, supra,* calls for an evaluation of the relative strength of the competitors of D.I. as well as its consumers. Competitors of D.I. consist primarily of N.F.O. and independent milk producers in the states of Kentucky, Tennessee ad Georgia, whereas in Mississippi and Louisiana, the Gulf Coast dairy producers and independent producers appear to have been the primary competitors. The testimony as to the precise shares of the relevant submarket held by these competitors of D.I. has not been forthcoming, and we are unable to delineate exactly how their shares increased or decreased by reasons of the execution of the full-supply and committed supply contract, except for the inescapable conclusion that the contracts themselves did eliminate these competitors from the shares of the market to which we have previously referred.

The Court must now determine the remedy to be imposed as a result of its conclusions that violations of the Clayton Act occurred more than eleven years ago. In determining what type of injunction should be entered, the Court is faced with the fact that D.I. has indicated that it no longer uses exclusive or full-supply one year contracts. The Government has presented in a brief its proposals as to the type of injunctive relief which should be entered. D.I. should be given an opportunity to respond with its proposals within fifteen

(15) days hereinafter, and with the Government given the right to file a counter-response within ten (10) days thereafter.

A judgment to this effect has been entered this day.

Dated 6/9/83

/s/ Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

Judgment.

In the United States District Court for the Western District of Kentucky at Louisville.

United States of America, Plaintiff, v. Dairymen, Inc., Defendant. Civil Action No. C 7634 A.

JUDGMENT

The Court, pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit, having reviewed the evidence in this action and having filed its findings of fact and conclusions of law, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the defendant has not violated the provisions of Section 2 of the Sherman Act.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant has violated Section 3 of the Clayton Act.

IT IS FURTHER ORDERED AND ADJUDGED that defendant be allowed fifteen (15) days within which to file its proposals as to what type of injunctive relief would be appropriate, with the United States allowed ten (10) days thereafter in which to file a counter-response.

This is not a final and appealable judgment.

Dated 6/9/83

/s/ Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

APPENDIX F.

SECTION 2 OF THE SHERMAN ACT
(15 U.S.C. § 2)

§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

SECTION 1 OF THE CAPPER-VOLSTEAD ACT
(7 U.S.C. § 291)

§ 291. *Authorization of associations; powers*

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations

are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

Feb. 18, 1922, c. 57, § 1, 42 Stat. 388.

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No. 83-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KINNETT DAIRIES, INC.,

Petitioner,

v.

DAIRYMEN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION BRIEF OF RESPONDENT, DAIRYMEN, INC.

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the courts below clearly err in finding that respondent Dairymen, Inc. ("DI") never possessed, acquired or maintained the power to control prices or exclude competition in any relevant geographic market or submarket? If not, the claim of monopolization was properly dismissed.

2. Did the courts below clearly err in finding that DI had no specific intent to monopolize? If not, the claims of attempt to monopolize and conspiracy to monopolize were properly dismissed.

3. Did the courts below clearly err in finding that DI, even if it intended to monopolize, had no dangerous probability of success? If not, the claim of attempt to monopolize was properly dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1039

KINNETT DAIRIES, INC.,

Petitioner,

v.

DAIRYMEN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION BRIEF OF RESPONDENT, DAIRYMEN, INC.

Respondent Dairymen, Inc. ("DI") respectfully submits this brief in opposition to the Petition For Writ Of Certiorari filed by petitioner Kinnett Dairies, Inc. ("Kinnett") to review the decision of the United States Court of Appeals for the Eleventh Circuit affirming the dismissal of Kinnett's complaint. DI has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

COUNTERSTATEMENT OF THE CASE

Kinnett's petition ("Pet.") seeks to present certiorari-worthy questions by framing and arguing as issues the scope of the antitrust exemption accorded agricultural cooperatives by the Clayton and Capper-Volstead Acts. In doing so, Kinnett wholly ignores the fact that the

courts below ruled against it on traditional antitrust principles without regard to the agricultural exemption or to DI's entitlement to such exemption. Relatedly, the petition attempts to divert attention from the binding effect of Fed. R. Civ. P. 52(a) by inviting the Court to ignore Mr. Justice Holmes' admonition that "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

A. Course Of Proceedings And Disposition In The District Court

Kinnett, a proprietary diary processor, filed its complaint (and jury demand) against DI, an agricultural milk marketing cooperative association of individual dairy farmers, on August 2, 1973. The complaint sought treble damages and injunctive relief based on allegations that DI alone and in concert with other agricultural associations of farmers had unreasonably restrained trade in, and had monopolized, attempted to monopolize and conspired to monopolize the supply of, Grade A raw milk in the Georgia Federal Order marketing area in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). 611-12; App. 6-8.[1] As discussed *infra*, Kinnett has abandoned its claim under Section 1.

Shortly before trial and after extensive discovery and the filing of detailed trial briefs and proposed jury instructions, Kinnett sought and obtained the district court's agreement to try the case without a jury. The case was tried to the court for three weeks during May and

[1] Our page references in this counterstatement are to the district court opinion in the official reports, Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608 (M.D. Ga. 1981) followed by references to the Appendices to Kinnett's petition. Appendices A-E are referred to collectively as "App."

June 1980. The trial produced a very large evidentiary record. 611; App. 6.

At the conclusion of the trial, the parties each filed proposed findings of fact and conclusions of law, critiques of each other's proposed findings of fact, replies to these critiques, post trial briefs and a Kinnett reply to DI's brief. On March 10, 1981, the district court issued its opinion and final judgment dismissing the complaint.

In its opinion, the district court set forth in great detail the evidence supporting its extensive findings of subsidiary and ultimate fact pertaining to: the joint and unilateral business activities of DI which Kinnett challenged as unlawful, DI's purpose in engaging in these activities, the relevant product market, the relevant geographic market and absence of submarkets, DI's market power alone and in combination with others, DI's specific intent to monopolize and the probability of successful monopolization. 614-30, 633-41; App. 11-45, 51-68. Upon the basis of these factual findings, none of which Kinnett challenges as clearly erroneous, the district court dismissed the complaint for two separate and independent reasons. The first reason rested upon the Capper-Volstead antitrust exemption. The second did not.[2]

---

[2] Kinnett refers to DI's dual status as a "major competitor" of Kinnett in processed milk products as well as a "dominant supplier of raw milk." Pet. at 3-4, 17. But there was no evidence adduced, nor even a contention by Kinnett, that DI monopolized or attempted to monopolize the sale of processed milk products in Georgia or anywhere else. In its complaint, Kinnett advanced the theory that DI as a raw milk supplier discriminated against Kinnett because DI was a processed milk products competitor. However, after extensive discovery Kinnett abandoned this claim prior to trial. 611; App. 6-7.

1. DI As A Capper-Volstead Cooperative

In its trial and post trial briefs Kinnett contended that DI's business activities about which it complained were "predatory." 612,614; App. 7, 11. The district court carefully scrutinized, both separately and collectively, all of DI's challenged "joint" and "unilateral" activities. "Joint" activities were those undertaken by DI jointly with other agricultural cooperatives or cooperative marketing agents, such as the Georgia Superpool, Great Lakes-Southern Milk and the Associated Reserve Standby Pool. 614-17; App. 11-17. "Unilateral" activities were those undertaken by DI independently of other cooperatives to market its own members' milk. These involved DI's premium pricing policy, one-year supply contract program and disputes with certain customers including Kinnett. 617-23; App. 18-30.

After separately describing these activities and making detailed findings of evidentiary fact, the district court found that "when such activities are considered separately or collectively" they "were not competition stifling or predatory in any sense of the word. . . ." 638; App. 62. Thus the district court concluded (*id.*) that DI was fully protected from antitrust liability under both Sections 1 and 2 of the Sherman Act by the Capper-Volstead Act (7 U.S.C. § 291) which provides in material part:

> Persons engaged in the production of agricultural products as . . . dairymen . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their

> members may make the necessary contracts and agreements to effect such purposes. . . .[3]

The district court's conclusion that DI was protected from antitrust liability by the Capper-Volstead Act was based upon the holding on interlocutory appeal in *Fairdale Farms, Inc.* v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1044, 1045 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981) that the Act exempts agricultural cooperative associations from Sherman Act liability unless they engage in predatory behavior. 631-32; App. 48-49. This holding was reaffirmed after remand in *Fairdale Farms, Inc.* v.

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[3] Farmers were a major force behind passage of the Sherman Act. They sought protection from concentrations of power in the packing and related industries from which the farmers purchased their needs and to which they sold their products. But when the same farmers began to organize in order to achieve some countervailing power, they found the Sherman Act used against them on the theory they had combined and conspired in unreasonable restraint of trade. See Maryland & Virginia Milk Producers Association, Inc. v. United States, 362 U.S. 458, 464 (1960).

Congress in 1914 responded to the farmers' need by enacting section 6 of the Clayton Act (15 U.S.C. § 17), which provides in pertinent part:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

But the Clayton Act exemption was limited to non-stock associations and farmers soon found a need to raise capital for processing and marketing their products. They also needed clarification of the terms "operation" and "legitimate objects"—terms which Congress failed to define in the Clayton Act. Congress responded again in 1922 by enacting the Capper-Volstead Act.

Yankee Milk, Inc., 715 F.2d 30 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3510 (January 9, 1984).

2. DI As An Ordinary Business Corporation

The second and independently sufficient reason for dismissal of Kinnett's Sherman Act Section 2 claim was that the district court, upon the basis of extensive and carefully developed factual findings, determined that Kinnett had failed to prove the elements of a monopoly case against DI when viewed as an ordinary business corporation. This reason relied neither upon DI's special status as an agricultural cooperative association nor upon the construction or application of the Capper-Volstead antitrust exemption to which such associations are entitled. 639; App. 63. Rather, it depended only upon subsidiary and ultimate findings of fact, fully supported by detailed evidentiary findings. 618-42; App. 19-70. The district court, treating DI as an ordinary business corporation, focused on whether DI had monopolized, attempted to monopolize or conspired to monopolize.

a. Relevant Product and Geographic Markets

First, the district court accepted Kinnett's contention that the relevant product market was raw Grade A milk, *i.e.*, milk suitable for consumption in fluid form. 623-24, 639; App. 30-31, 63. It then dealt in great detail with the relevant geographic market under the test established by this Court in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The district court separately considered and made specific findings with respect to (1) the area within which DI operated, (2) the area to which Kinnett could practicably turn for an alternative supply, and (3) the effect of federal milk marketing regulations on the availability of alternative supplies. 624-28; App. 32-41. The district court found that the relevant geographic

market was made up of nine Southeastern states and parts of four others. 639; App. 64-65.

The district court rejected Kinnett's contention that either the Georgia Federal Order marketing area or the combined boundaries of federal order areas surrounding Georgia were relevant geographic submarkets. This rejection was based upon evidence concerning the artificial nature of federal order marketing areas, milk's perishability and transportability and alternative supply sources actually utilized by Kinnett, 624-25, 628, 640; App. 33-34, 39-40, 66-67. Upon the basis of this evidence the district court found that Kinnett's area of practicable supply extended beyond the boundaries of its proposed geographic submarkets. 625, 639-40; App. 33-34, 64-67. Kinnett does not challenge these findings.

b. Market Power

Having determined the relevant product and geographic markets, the district court recounted the evidence and made detailed findings concerning DI's market power. The district court found that in the Georgia Federal Order marketing area proposed by Kinnett as the relevant geographic market DI's market share declined steadily from a high of 73% in 1970 to 58% in 1979 (629, 641; App. 42-43); that in the combined area of Georgia and its adjacent states DI's market share never exceeded 42.4% (629; App. 44); that in the thirteen state area found to be the relevant geographic market DI's market share did not exceed 30.2% (*id;* App. 43); that a cooperative's market power is tenuous and transitory (641; App. 68); that government antitrust experts believe that a 75% market share is the minimum necessary for a cooperative to control prices effectively (629; App. 42); and that Kinnett in one five-month period replaced one-third of its DI milk with the milk of defecting DI mem-

bers. 641; App. 68. On the basis of these findings, which are not challenged by Kinnett, the district court found that DI had not monopolized because "[a]t no time relevant to this action has DI possessed, acquired, or maintained the power to control prices or exclude competition in any relevant geographic market." 640; App. 67. DI did not possess such power either alone or in combination with others. 614; App. 67.

c. Intent To Monopolize And Probability Of Success

Much of the district court's analysis concerned DI's intent. In reviewing DI's conduct of which Kinnett complained, the district court repeatedly considered, balanced and resolved on the evidence conflicting contentions concerning DI's purpose. Thus, the district court determined that DI's joint and unilateral activities were all pursued for legitimate marketing reasons and were precipitated in large part by the peculiar nature of milk marketing with its seasonal fluctuations in supply and demand (614-17, 635; App. 11-17, 54.); that DI's disputes with its customers were mainly anecdotal, isolated events in which DI was responding to the customers' aggressive and precipitous behavior (618-23, 637-38; App. 20-30, 59-62); that DI's activities "were not competition stifling or predatory in any sense of the word" (638; App. 62);[4] that DI's activities "did not operate to substantially lessen

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[4] In using the term "predatory," the district court was not referring to conduct in the pejorative sense. The court was referring to conduct evidencing an intent " 'unnecessarily, unreasonably or illegally to exclude a competitor from a market' " and to " 'unfair methods of competition, or business patterns not honestly industrial—in short, what may loosely be called unfair means.' " [Citations omitted.] 631 n. 31; App. 47-48.

competition or to unreasonably restrain trade" (633);[5] and that DI had "no conscious intent to stifle or smother competition or to exclude others from the market place." 643; App. 72. Kinnett does not challenge these findings as clearly erroneous.

From these repeated and detailed determinations of purpose and effect, the district court concluded that DI was not guilty of either an attempt or conspiracy to monopolize because it did not have the requisite specific intent. 641-43; App. 68-72. Based upon its market power analysis (*supra* at 7-8), the district court also found that Kinnett had failed to prove the second element of its attempt to monopolize claim, *i.e.*, that there was a dangerous probability of successful monopolization. 442-43; App. 69, 72.

B. Disposition In The Court Of Appeals

Kinnett did not appeal the dismissal of its Sherman Act Section 1 claim. On September 19, 1983, the Eleventh Circuit (Judge Morgan dissenting) affirmed per curiam the district court's dismissal of the Sherman Act Section 2 claim observing that "[t]he facts of this case are reported in detail in the excellent district court opinion of Judge Bootle." 715 F.2d 520; App. 1. The court of appeals considered "only two [of Kinnett's] arguments worthy of discussion." *Id.* Each was based upon the opinion of the Sixth Circuit in *United States* v. *Dairymen, Inc.*, 660

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[5] Here, and elsewhere in this brief, there is no companion citation because Appendix B omits three paragraphs of the district court opinion. Compare 512 F. Supp. at 633 with Appendix B at 51. The omitted portion contains the quoted passage. These three paragraphs, which undoubtedly were omitted through a printing error, are highly relevant. Because these paragraphs are cited a number of other times in this brief, we suggest that the Court may wish to use the official report of the case in lieu of Appendix B.

F.2d 192 (6th Cir. 1981). Kinnett argued that the opinion of the district court was contrary to that of the Sixth Circuit in two respects: first, that the district court used an overly stringent test of predation and did not focus on DI's intent; and second, that the district court failed to consider relevant geographic submarkets. 715 F.2d at 520-21; App. 1-2.

The court of appeals properly rejected these arguments in quick order. First, the court of appeals held that the district court focused on DI's intent using the precise standard ("an intent to smother competition") articulated by the Sixth Circuit.[6] *Id.* Second, the court of appeals held, without dissent, that the district court's "major and independent reason for rejecting Kinnett's submarket arguments was the failure of the proposed submarkets to coincide even closely with those resulting from the court's application of the [Supreme Court's] *Tampa Electric* test, the very test the Sixth Circuit ordered the district court in that case to apply." *Id.* at 521; App. 2-3.

REASONS FOR DENYING THE PETITION

The courts below, without regard to the Capper-Volstead exemption, found that Kinnett had failed to prove the elements of monopolization, attempt to monopolize or conspiracy to monopolize under Section 2 of the Sherman Act. The necessary subsidiary findings that DI

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[6] We suggest that Judge Morgan was plainly wrong in his belief that the district court held Kinnett to a higher standard of proof than it would have faced against an ordinary business corporation; and that the district court gave only summary treatment to the question of whether DI had a specific intent to monopolize. *Id.* at 521-22; App. 4-5. See discussion *supra* at 8-9. Judge Morgan, however, did not disagree with the majority's rejection of Kinnett's geographic submarket argument.

lacked monopoly power in any relevant geographic market, the specific intent to monopolize and the dangerous probability of success are all amply supported by the evidence and are therefore not "clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a).

The courts below applied the correct legal standards in arriving at these determinations and conducted their legal and factual analyses in accord with the decisions of other circuits and this Court. For these reasons, and because no important questions of federal law have been presented, the petition should be denied.

I. The Petition Presents No Important Issue Of Federal Law

Kinnett's first two arguments are that its petition should be granted because the courts below decided an important issue of federal law not previously settled by this Court in a way which conflicts with this Court's basic precepts. Pet. at 16-26. The important issue of federal law identified is the proper scope of the antitrust exemption accorded agricultural cooperatives (such as DI) by Section 6 of the Clayton Act (15 U.S.C. § 17) and Section 1 of the Capper-Volstead Act (7 U.S.C. § 291). Pet. at 16, 18. No such issue exists.

In its complaint and in the post trial briefing in the district court Kinnett contended that DI's joint activities with other agricultural cooperatives were unreasonable restraints of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. App. 6-7. The district court held that such joint cooperative activities were protected from Sherman Act Section 1 liability by the antitrust exemption. *Supra* at 4-6. Notwithstanding its pejorative characterizations of these joint activities, Kinnett did not assign error to this holding in its appeal to the Eleventh Circuit—nor does it do so here. Instead, it creates a

nonissue by contending that these joint activities show a violation of Section 2 of the Sherman Act which is not protected by the Capper-Volstead exemption. Pet. at 16-26.

As we earlier demonstrated, the district court dismissed Kinnett's Sherman Act Section 2 claim for the independently sufficient reason that Kinnett failed to prove the elements of a Section 2 case against DI as an ordinary business corporation. This reason relied neither upon DI's status as an agricultural cooperative nor upon the construction or application of the Capper-Volstead exemption. See discussion *supra* at 6-9. The Eleventh Circuit affirmed for this reason. It did not consider DI's special status as an agricultural cooperative nor did it consider or even discuss the exemption. 715 F.2d at 520-21; App. 1-3. Accordingly, the important issue of federal law perceived by Kinnett is at best "extraneous" and thus provides no ground for granting the petition. *Hodges* v. *United States*, 368 U.S. 139, 140 (1961). Certiorari should not be granted when it is manifest that the decisions below did not turn on the issue presented by the petition. *Smith* v. *Butler*, 366 U.S. 161 (1961).[7]

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[7] Kinnett seeks to entice the Court with the contention that "no prior case has involved anything like the far-reaching monopoly by combination involved in this case. . . ." *Pet.* at 17. This is the first time that Kinnett has argued monopoly by combination. See appeal brief of petitioner Kinnett at 1-2. Its failure to raise this issue below aside, Kinnett's contention wholly ignores the district court's findings (fully supported by uncontested findings of evidentiary fact) that DI never possessed monopoly power either alone or "in combination with any other organizations." 512 F. Supp. at 641; App. 67. See *supra* at 8. Kinnett does not challenge these findings as clearly erroneous.

Thus, Kinnett is left only with its third and final argument that the Eleventh Circuit's decision is in conflict with that of the Sixth Circuit. Pet. at 26.

II. The Eleventh Circuit's Decision Is In Harmony With The Decisions Of The Sixth Circuit, Other Circuits And This Court

Kinnett presses two arguments to support its contention that the decisions of the Eleventh and Sixth Circuits are in conflict. The first is that the Eleventh Circuit improperly required Kinnett to support its Sherman Act Section 2 claim with proof of "predation." Pet. at 26-28. The second is that the Eleventh Circuit improperly refused to consider geographic submarkets. *Id.* at 28-29. Both arguments are dead wrong. The decisions of the two circuits are, as shown below, in perfect harmony.

A. The Courts Below Employed The Correct Legal Standards To Evaluate The Lawfulness Of DI's Conduct

The linchpin of Kinnett's predation argument (Pet. at 26-27) is that the district court was led astray or was unduly influenced by the district court decision in *United States* v. *Dairymen, Inc.*, 1978-1 Trade Cases ¶ 62,053 (W.D. Ky. 1978) which the Sixth Circuit reversed (660 F.2d 192; App. 76) subsequent to the district court's decision in the *Kinnett* case. Hereafter we refer to *United States* v. *Dairymen, Inc.* as the Government case. However, the decisions below track the Sixth Circuit's decision.

In the Government case, *unlike* the present case, the district court made no finding concerning DI's specific intent. Instead, it dismissed the Government's attempt to monopolize charge because the Government failed to prove that "DI's practices rose to the level of predatory practices, *i.e.*, anticompetitive practices without busi-

ness justification." 660 F.2d at 193-94; App. 80-81. In remanding, the Sixth Circuit instructed the district court there to do what the district court did here, namely, to determine whether DI had a specific intent to monopolize. In making this determination, the Sixth Circuit further instructed the district court that "the most important inquiry is whether these [supply] contracts were intended to stifle competition or were intended to meet legitimate business purposes." 660 F.2d at 195; App. 81.

In the present case, the district court did exactly what the Sixth Circuit in the Government case instructed and more. It determined on the basis of carefully crafted factual findings—none of which are challenged by Kinnett—that the practices of which Kinnett complains were pursued by DI to meet legitimate business purposes. 512 F. Supp. at 614-17, 633, 635; App. 11-17, 54-55.[8] The district court specifically found that DI's practices were *not intended* to "stifle competition" (*id.* at 643; App. 72) or to "smother competition" (*id.*) or to "exclude others from the market place" (*id.*) or to be used as "unfair weapons or means" (*id.* at 641; App. 68); that they did not "substantially lessen competition" or

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[8] For example, after recounting in detail the development and negotiation of DI's supply contracts and other dealings with its customers in light of the "particular economic context" in which they took place (National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 393 n.19 (1981)) the district court found:

> D.I.'s one year written supply contracts and its other dealings with handlers including Kinnett were legitimate means by which D.I. marketed the milk of its members. In particular, the written contracts were reasonable in duration and were necessitated by the nature of milk marketing and the course of dealings between D.I. and its customers.

[*Id.* at 633]

"unreasonably restrain trade" (*id.* at 633); that they were not "predatory in any sense of the word" (*id.* at 633; App. 51-52); and that they were not " 'unfair methods of competition, or business patterns not honestly industrial.' " *Id.* at 631 n. 31; App. 48. Upon the basis of these findings, the Eleventh Circuit rejected Kinnett's predation argument because the district court decision was in harmony with the Sixth Circuit's decision in the Government case. 715 F.2d at 521; App. 2.

It is thus abundantly clear that the courts below employed the entire bundle of legal and factual antitrust standards in determining that DI's practices were neither anticompetitive nor engaged in with the specific intent to monopolize. These standards are straight from the pages of the Sixth Circuit decision in the Government case and from the decisions of this Court and other circuits in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953) ("a specific intent to destroy competition" versus practices "predominantly motivated by legitimate business aims"); *Maryland & Virginia Milk Producers Association, Inc.* v. *United States*, *supra*, 362 U.S. at 463-64 (prohibiting "competition-stifling practices" or "predatory practices"); *Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1183 (8th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 2108, 2110 (1983) (prohibiting the pursuit of monopoly power "by eliminating or restraining competition with the co-op through predatory or anti-competitive practices"); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (prohibiting conduct "directed at smothering competition."); *Pacific Eng. & Prod. Co. of Nevada* v. *Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) (prohibiting the use of "unfair means"); *Union Leader Corp.* v. *Newspapers of New*

England, Inc., 180 F. Supp. 125, 140 (D.Mass.), *aff'd*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) (prohibiting the use of "unfair weapons").

The courts below having applied the correct legal standards and having found on the basis of detailed uncontested evidentiary findings that DI lacked the requisite specific intent to monopolize, it is clear that Kinnett has presented no ground for certiorari. Recently, this Court in *Pullman-Standard, Inc.* v. *Swint*, 456 U.S. 273, 288 (1982) reaffirmed its holding in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) that " '[f]indings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact"—in this case the district court. Here, the district court's unchallenged factual findings as to motive and intent are no more reviewable on certiorari than they were in *Pullman-Standard* and *Yellow Cab*.

Even if it be assumed, arguendo, that the district court clearly erred in its finding of no specific intent, its finding of no dangerous probability of success defeats Kinnett's attempt to monopolize claim. Neither Kinnett nor Judge Morgan's dissent challenges this finding as clearly erroneous.[9]

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[9] Kinnett contends that on remand of the Government case "the district court found that [DI's supply contracts]—the very ones upheld as lawful in our case—were intended to stifle competition and established DI's specific intent to monopolize." Pet. at 26. The district court found no such thing. Rather, it specifically found (as did the district here) that "there are sound business reasons for the execution of committed and full supply contracts of one year's duration." App. 98. While it is true that on all the evidence from a different record the district court on remand in the Government case found a specific intent to monopolize, it highlighted the factual nature of its finding: "In short, the evidence as to specific intent is rather closely balanced, but the Court finds that the balance tips slightly in favor of

B. The Courts Below Employed The Correct Geographic Market Analysis

To establish the offense of monopolization under Section 2 of the Sherman Act one must prove that the defendant actually possesses or possessed monopoly power in a relevant geographic market. The district court, obedient to the dictates of *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) and of *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956), defined such power as the power to control prices or exclude competition. *Supra* at 8. In applying this standard, which Kinnett does not question, the court first determined the relevant product market to be Grade A milk—the product market urged by Kinnett. *Supra* at 6. It then applied, as did the Sixth Circuit, the test of *Tampa Electric Co.* v. *Nashville Coal Co.*, *supra*, 365 U.S. at 327—namely, determination of the area in which Kinnett operated, and to which it could practicably turn for supplies. *Supra* at 6-7.

It is at this point in the analysis that Kinnett portrays the courts below in error. Pet. at 28-29. The mote which Kinnett finds in the eyes of the courts, however, does not relate to the application of the *Tampa Electric* test. Nor does Kinnett complain that the district court failed, in applying that test, to consider each of the geographic submarkets proposed by Kinnett. Indeed, the district court specifically considered, discussed and rejected the

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the United States." App. 91-92. Unfortunately for Kinnett, the district court here made a contrary finding. And, in any event, the district court on remand in the Government case found—as did the district court here—that there was no violation of Section 2 of the Sherman Act because there was no dangerous probability of successful monopolization. App. 94.

smallest geographic unit proposed by Kinnett as the relevant geographic market—*i.e.*, the area of the principal federal market order in Georgia. *Supra* at 7. The district court also specifically considered, discussed and rejected the larger alternative area proposed by Kinnett. *Id.*[10] Kinnett does not assert that these findings of the district court were clearly erroneous.

Kinnett's quarrel with the courts below is one of nomenclature, not substance. The district court was of the view that, having determined from the evidence the relevant geographic market, it was not obliged to determine whether there were, within that market, more restricted "submarkets" for the same product. It was of the view—we think properly—that in a monopolization case a determination that a particular area is the relevant geographic market under the *Tampa Electric* test is an implicit rejection of any other proposed market. In fact, however, the district court's rejection of the Kinnett geographic submarket proposals was not *implicit*. Indeed, it specifically did what it did not feel obliged to do. As noted, the court explicitly dealt with and made factual determinations rejecting each Kinnett proposal—whether one denominates them as proposed geographic "markets" or as "submarkets." Thus, the district court performed the only fact-finding function necessary even were one to agree with the proposition, urged by Kinnett, that a single product having a defined geographic market can at the same time have relevant geographic "submarkets." Pet. at 29.

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[10] Thus, Kinnett is plainly wrong when it contends that the district court "did not even give lip service to the established principle that the Sherman Act applies to 'localized geographic areas.' " Pet at 29 n. 83.

The district court having correctly applied the *Tampa Electric* test and having specifically applied this test in rejecting each of Kinnett's proposed submarkets upon the basis of evidentiary findings which Kinnett does not challenge, it follows that the Eleventh Circuit was correct in its determination that "it would of course serve no purpose to remand for application of that test." 715 F.2d at 521; App. 3.

CONCLUSION

For all of the foregoing reasons, Kinnett's petition should be denied.

Respectfully submitted,

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No. 83-1039

IN THE

Supreme Court of the United States

October Term, 1983

KINNETT DAIRIES, INC.,

Petitioner,

vs.

DAIRYMEN, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

REPLY BRIEF OF PETITIONER, KINNETT DAIRIES, INC.

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KINNETT DAIRIES, INC.,

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REPLY BRIEF OF PETITIONER, KINNETT DAIRIES, INC.

Petitioner Kinnett Dairies, Inc. ("Kinnett") in accordance with Rule 22.5 of the Supreme Court hereby submits its Reply Brief to the Opposition Brief ("Opp. Brief") of Respondent Dairymen, Inc. ("DI"). Kinnett submits its Reply Brief to address certain issues first raised by DI in its Opposition Brief and certain inaccuracies and misleading statements surrounding those issues.

Specifically, Kinnett is replying to DI's contentions (a) that Kinnett's Sherman Act Section 2 claims concerning DI's joint activities with other cooperatives were never raised before the district court below, (b) that it has been exonerated of all claims against it even when viewed as an ordinary business corporation, absent Capper-Volstead Act exemption, and (c) that the district court's evidentiary findings have remained uncontested by Kinnett.

Kinnett is not unmindful of Mr. Justice Holmes' admonition that "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Nor does Kinnett propose to restate its position concerning the conflicting legal standards that have been used to evaluate DI's conduct by the courts below in this case and by the Sixth Circuit in *United States v. Dairymen, Inc.*, 1981-2 Trade Cas. ¶ 64,302 (6th Cir. 1981), *on remand*, 1983-2 Trade Cas. ¶ 65,651 (W.D. Ky. 1983). Kinnett believes that this issue is amply discussed in its Petition for Writ of Certiorari ("Plf. Pet.") and has been amplified by the National Independent Dairy-Foods Association in its brief filed *amicus curiae*. However, DI's position on the three subjects enumerated above is so greatly misleading that it requires a brief response.

ARGUMENT.

I.

KINNETT'S PETITION DOES PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

A. Kinnett Has Always Claimed That DI's Joint Activities Were Section 2 Violations of the Sherman Act.

In arguing that Kinnett's Petition presents no important issue of Federal law, DI makes the astonishing assertion that Kinnett never alleged that its joint activities with other cooperatives were violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (as well as Section 1), and that Kinnett has created a "non-issue," or new issue, not raised before the courts until its appeal. (Opp. Brief at 11-12)

Kinnett's complaint clearly alleged DI's joint activities with other cooperatives to be violations of both Sections 1 and 2 of the Sherman Act, and Kinnett has maintained those Section 2 claims ever since. (*See Complaint*, attached hereto as Appendix A, ¶¶ 14, 15, 19e, 19f and 19g.)

The district court opinion in this case itself reflects Kinnett's claim that DI's joint activities were part of its Section 2 violation:

> The plaintiff charges that the defendant, acting alone *and in concert* with other milk producers, attempted to and did successfully restrain trade and commerce in and *monopolize* the supply of raw Grade A milk. The plaintiff complains that the defendant entered into a series of *anticompetitive arrangements with other cooperatives with the purpose and effect of obtaining or maintaining monopoly power* . . . .

512 F. Supp. at 611-12; Plf. Pet., App. B at 7 (emphasis added).

Moreover, as a preface to its discussion of DI's joint marketing activities with other cooperatives, the district court stated:

> In its most recent brief (Plaintiff's Reply to Defendant's Post Trial Brief) the *plaintiff contends* that the following listed incidents of *joint activity* by the defendant *evidence a scheme of cooperative monopolization* which includes predatory conduct and that such conduct is neither legitimate nor immune from suit.

512 F. Supp. at 614; Plf. Pet., App. B at 11 (emphasis added).

Thus, for DI to argue that Kinnett has created a non-issue, *i.e.*, an issue of monopoly by combination which Kinnett failed to raise below, is a gross distortion of the procedural history of this case. It not only flies in the face of the complaint and post trial briefings themselves, but in the face of the district court's understanding of the plaintiff's allegations as well.

B. If DI Were Viewed as an Ordinary Business Corporation, Its Arrangements With Other Cooperatives Would Constitute Per Se Violations of the Sherman Act.

DI in its Opposition Brief asserts that the district court dismissal of Kinnett's Sherman Act Section 2 claims can be supported by the independently sufficient reason that the district court found that Kinnett failed to prove the elements of a Section 2 case against DI as an ordinary business corporation. (Opp. Brief at 3, 6-9) Kinnett respectfully submits, and states bluntly, that such a finding is absurd on its face and plain error as a matter of law with respect to both DI's joint and unilateral cooperative activities. It is clear beyond the shadow of a doubt that if an ordinary business corporation had entered into the horizontal arrangements with

competitors as DI did with the cooperatives in the Georgia Super Pool, Great Lakes Southern Milk, Inc. ("GLSM"), the Associated Reserve Standby Pool ("ARSPC") or any of them, it would unquestionably have been found to have violated the Sherman Act *ipso facto* without any inquiry into its motives, intent or market power.[1] The district court itself found with respect to GLSM alone that:

> The stated goal of GLSM at its formation was to put an end to processors "playing one market or one co-operative against another" in order to bring down the raw milk prices. Its functions include: improving the prices of the dairy farmer members of the member cooperatives, attempting to assure that the prices in the various markets served by member cooperatives are in alignment, providing a forum for discussion of Class 1 prices and alignment, and making recommendations for Class 1 pricing and price alignments.

512 F. Supp. at 615; Plf. Pet., App. B at 13.

Thus the district court did not deny that the activities of which Kinnett complains took place. Rather, it chose to find them the legitimate marketing activities of Capper-Volstead cooperatives. (512 F. Supp. at 630-33; Plf. Pet., App. B at 46-51)

Furthermore, while DI denies that it did anything improper or illegal, it does not deny that its challenged activities with other cooperatives did occur much as Kinnett has described them. (*See* Plf. Pet. at 4-10 and facts cited therein.)

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[1]*See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 and n.59 (1940) (price tampering via control of supply through elimination of surplus); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 240-42 (1899) (market division via joint ventures); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972) (customer allocation via common purchasing agent); *United States v. Associated Press*, 326 U.S. 1, 11-13 (1945) (restrictive contracts).

Since DI did admittedly combine with other cooperatives to fix prices, allocate markets and control surpluses, there can be no denying that if DI is truly viewed as an ordinary business corporation, Kinnett has proven claims of a conspiracy to restrain and monopolize trade in violation of both Sections 1 and 2 of the Sherman Act.

Thus this Court is still left with the first question presented by Kinnett in its Petition, a question of federal law which is of crucial importance to independent dairy processors nationwide: Does the Capper-Volstead Act provide such absolute immunity from the Sherman Act that large regional cooperatives may band together in cartel fashion to fix prices, divide territories and customers, restrict supplies and artificially interdict the movement of a basic nutritional commodity like raw milk?

II.

THE DISTRICT COURT'S EVIDENTIARY FINDINGS IN THIS CASE HAVE BEEN TAINTED BY THE APPLICATION OF ERRONEOUS LEGAL STANDARDS.

DI repeatedly asserts that the district court's evidentiary findings in this case stand uncontested by Kinnett. This is simply wrong. Kinnett's contention is that the district court applied erroneous standards of law in reaching its findings and that if the district court was using the wrong yardstick, its measurements must be discarded; its factual findings are meaningless and irrelevant.

Given Kinnett's basic disagreement with the standards used in this case to determine a Capper-Volstead cooperative's liability under the antitrust laws, particularly with respect to the questions of predation and geographic submarkets, it is an extremely misleading and unfair statement of Kinnett's position to argue, as DI repeatedly does, that Kinnett does not contest the factual sufficiency of the finding that DI's complained-of activities "were not competition

stifling or predatory in any sense of the word." (512 F. Supp. at 638; Plf. Pet., App. B at 62; *see* Opp. Brief at 6-9)

The difference in the standard of predation[2] that has been applied to Kinnett's case and that enunciated by the Sixth Circuit in *United States v. Dairymen, Inc.*, 1981-2 Trade Cas. ¶ 64,302 (6th Cir. 1981), was discussed at length in Kinnett's Petition as were the different standards of evaluating relevant geographic markets used here and in *United States v. Dairymen, Inc., supra*, and in *United States v. Dairymen, Inc., on remand*, 1983-2 Trade Cas. ¶ 65,651 (W.D. Ky. 1983). The district court's evidentiary findings as they relate to market definition, market power and intent were all necessarily dictated by the legal standards the court used. They could not be otherwise. The fact that the District Court of Kentucky reached a contrary result on the same facts proves the point; under the proper legal standard, the facts are sufficient to support a finding that DI's conduct was anticompetitive. The factual findings here have all been tainted by the application of erroneous *standards* which are

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[2]DI misleads this Court when it asserts the district court was using the term "predatory" in a loose, nonpejorative sense. (*See* Opp. Brief at 8.) DI refers this Court to p. 631, n.31, of the district court opinion (*see* Plf. Pet., App. B at 47-48) but a careful reading of this footnote shows that the district court was merely exploring the different meanings of the word "predatory" at this point in its opinion, including definitions that could be called worse than pejorative. It is clear that the district court, in analyzing the character of DI's conduct, was guided solely by the now reversed district court opinion in *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. ¶ 62,053 (W.D. Ky. 1978), and the Second Circuit in *Fairdale Farms, Inc. v. Yankee Milk, Inc., et al.*, 635 F.2d 137 (2d Cir. 1980) (*see* 512 F. Supp. at 635-37, 642-43; Plf. Pet., App. B at 55-59, 70-73).

in conflict with the *legal standards* used in other circuits and other district courts, and Kinnett properly seeks review of those standards by this Court.

DATED: February 15, 1984.

Respectfully submitted,

BLECHER, COLLINS & WEINSTEIN,
MAXWELL M. BLECHER,
CONSUELO S. WOODHEAD,

HATCHER, STUBBS, LAND, HOLLIS & ROTHSCHILD,
ALBERT W. STUBBS,
By CONSUELO S. WOODHEAD,

Attorneys for Petitioner, Kinnett Dairies, Inc.

APPENDIX A.

Complaint for Damages and Injunctive Relief. (Antitrust Laws — Jury Demanded)

United States District Court, Middle District of Georgia, Columbus Division.

Kinnett Dairies, Inc., Plaintiff, v. Dairymen, Inc., Defendant. No. 1701.

Filed: August 2, 1973.

The above-named plaintiff files this complaint against the above-named defendant and, demanding trial by jury, complains and alleges as follows:

COUNT ONE

I.

JURISDICTION AND VENUE

1. The complaint is filed and these proceedings are instituted against the above-named defendant under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) and under Section 6 of the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2305) to secure damages and injunctive relief from the above-named defendant for its violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13), Section 3 of the Clayton Act (15 U.S.C. § 14), Section 4 of the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2303) as hereinafter alleged, and the doctrine of pendent jurisdiction.

2. The defendant maintains an office, transacts business and may be found within the Middle District of Georgia. The interstate trade and commerce involved and affected by the alleged violations of the antitrust laws is carried on in part within the Middle District of Georgia.

II.
THE PARTIES

3. Plaintiff, KINNETT DAIRIES, INC., is a corporation organized and existing under the laws of the State of Georgia and maintains its principal place of business in Columbus, Georgia. Plaintiff is an independent processor, distributor and retailer of fresh milk and milk products.

4. Defendant DAIRYMEN, INC., is an agricultural cooperative marketing association, as defined in 7 U.S.C. § 291, incorporated and existing under the laws of the State of Kentucky with its principal office at Louisville, Kentucky. Dairymen, Inc., has a membership of approximately 9,500 milk producers located in the following states, among others: Alabama, Kentucky, Tennessee, Georgia, Mississippi, Louisiana, North Carolina, South Carolina, Virginia and Indiana. Dairymen, Inc., also owns and controls numerous large volume plants that process and distribute fluid milk and milk products. Dairymen, Inc., was formed in the latter part of 1968 as a combination of and successor in interest to various other cooperatives including, as of September 1, 1970, Georgia Milk Producers Cooperative. Any reference to defendant Dairymen, Inc., unless the context requires otherwise, is also a reference to previously existing corporations and entities that have been merged or consolidated into Dairymen, Inc.

III.
CO-CONSPIRATORS

5. Various corporations and individuals not made defendants herein, including but not limited to milk haulers and processors, have participated in the violations alleged and have performed acts and made statements in furtherance thereof.

IV.

DEFINITIONS

6. As used herein:

(a) "Milk" means the raw milk of cows suitable for utilization as fluid milk;

(b) "Fluid milk" means pasteurized milk sold by processors for human consumption in fluid form;

(c) "Producer" means a person engaged in the production of milk;

(d) "Independent producer" means a producer not a member of Dairymen, Inc.;

(e) "Processor" means a person, partnership or corporation engaged in the business of purchasing milk and processing, bottling and/or packaging and selling fluid milk and milk products;

(f) "Dairymen, Inc. marketing area" means the geographical area comprising the territory in which Dairymen, Inc. members produce milk, i.e., substantially all of Kentucky, Tennessee, Georgia, and Mississippi, and portions of Indiana, Louisiana, Alabama, North Carolina, South Carolina, Virginia, and West Virginia.

V.

NATURE OF TRADE AND COMMERCE

7. Substantial quantities of milk are produced and marketed in the Dairymen, Inc. marketing area by Dairymen, Inc. and by independent producers who compete with it in the sale of milk to processors for fluid utilization. Milk is transported by haulers from producers to processors, who require a constant supply of milk in order to carry on their business. In the production, transportation and marketing of milk by producers, haulers, and processors in the Dairymen, Inc. marketing area there is a continuous and substantial flow of trade and commerce among the states. In

1970 about 11 billion pounds of milk were marketed in the Dairymen, Inc. marketing area.

8. Processors pay for their purchases of milk according to its end use. Under Federal milk marketing orders, effective in many areas of Dairymen, Inc.'s marketing area, a market administrator sets a Class I price for milk used as fluid milk and a lower Class II price for milk utilized in manufacturing milk products. The blend price, which reflects total utilization in a market during the preceding month, is paid each month by processors to producers in the market. Producers who are members of an agricultural association are not paid directly by the processors but by the association, which collects from the processors. The amount paid to the association frequently includes a premium, which is added to the blend price. Market order regulations have allowed inclusion, for the purpose of computing the blend price, of milk produced outside the area, transported into it, and then diverted and processed outside the area. Importing Class II milk into a market reduces the blend price received by producers.

9. Dairymen, Inc. was formed in September, 1968, as a consolidation of eight associations of milk producers, each of which now forms the nucleus of a Dairymen, Inc. division. It operates through eleven divisions. Dairymen, Inc. has also acquired and operates manufacturing and processing facilities. When it was formed membership consisted of more than 7,000 producers shipping close to three billion pounds of milk annually. Many producers are members of Dairymen, Inc. as a result of membership in predecessor producer associations. Other milk producer associations have joined Dairymen, Inc. since its formation and the membership has risen to more than 9,000 farmers. In its second fiscal year, ending August 31, 1970, Dairymen, Inc. members marketed 3.6 billion pounds of milk for a total value

to members of approximately $223 million. In the fiscal year ending August 31, 1971, Dairymen, Inc. members marketed more than 5.0 billion pounds of milk for a total value of more than $351 million. In the fiscal year ending August 31, 1972, Dairymen, Inc. members marketed more than 5.0 billion pounds of milk for a total value of more than $390,899,235. A substantial quantity of this milk was sold and shipped to states other than the state in which it was produced.

10. In its marketing area Dairymen, Inc. is the dominant supplier; in some parts of its marketing area it controls more than 90% of the milk production. Most processors in this area, whose purchases of milk represent a substantial part of the market for milk producers, have no choice but to buy part of their requirements of milk from Dairymen, Inc.

11. In 1968 and 1969, Dairymen, Inc. supplied milk to processors under oral agreements on a weekly basis. In or about December 1969, Dairymen, Inc. notified its customers that it intended to require processors who wished to buy milk from it to execute full supply contracts. These contracts were not executed at that time. In or about the summer of 1971, Dairymen, Inc. again notified its customers that it intended to insist upon modified full supply contracts. It threatened to cut off the milk supplies of any processor who did not sign, and in fact did cut off the milk supplies of certain of these processors.

12. Milk must be transported from producers to the plants of processors. Most individual producers do not produce sufficient quantities of milk to make it economically feasible for them to transport their milk themselves and must rely on milk haulers to perform this service. Haulers having a substantial part of the milk hauling capacity in the Dairymen, Inc. marketing area have entered into contracts with Dairymen, Inc. for the transportation of the milk of Dairy-

men, Inc. members. These haulers have been instructed by Dairymen, Inc. not to transport the milk of independent producers.

13. Dairymen, Inc. is engaged in interstate commerce, and there is a continuous flow of milk in interstate commerce. During the period covered by this complaint, Dairymen, Inc. has sold and shipped substantial quantities of milk in states other than the states in which it was produced. Dairymen, Inc. also owns a number of plants in many states at which it processes milk and from which it sells and ships fluid milk and milk products across state lines.

VI.

VIOLATIONS ALLEGED

14. Beginning in or about 1968, the exact date being unknown to the plaintiff, and continuing up to and including the date of the filing of this complaint, defendant and the co-conspirators have engaged in a combination and conspiracy to unreasonably restrain and monopolize the above-described interstate trade and commerce in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §§ 1 and 2), commonly known as the Sherman Act.

15. Beginning in or about 1968, the exact date being unknown to the plaintiff, and continuing up to and including the date of the filing of this complaint, defendant has attempted to monopolize the above-described interstate trade and commerce in violation of Section 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 2), commonly known as the Sherman Act.

16. Beginning in or about 1968, the exact date being unknown to the plaintiff and continuing up to and including the date of the filing of this complaint, defendant has entered into contracts, agreements, and understandings in unrea-

sonable restraint of the above-described trade and commerce in violation of Section 1 of the Sherman Act, and the effects of which may be substantially to lessen competition or tend to create a monopoly in said trade and commerce in violation of Section 3 of the Clayton Act. The substantial terms of said contracts, agreements, and understandings are that processors including the plaintiff herein are required to purchase from defendant all or substantially all of their milk requirements.

18. Beginning in or about 1968, the exact date being unknown to plaintiff and continuing through the date of the filing of this complaint, defendant has coerced and discriminated and threatened to coerce and discriminate against milk producing farmers and plaintiff in violation of Section 4 of the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2302).

19. In violating each of the foregoing statutes and with the specific intent to so do and to injure the plaintiff and eliminate plaintiff as a viable competitive entity, the defendant and co-conspirators have done the following things among others:

(a) Entering into the contracts, agreements, and understandings hereinbefore described in the preceding paragraphs;

(b) acquired and merged into Dairymen, Inc. the following processing dairies:

(1) Wells Dairies Cooperative, Columbus, Georgia;

(2) Irvindale - Miss Georgia Dairies, Atlanta, Georgia;

(3) South Georgia Dairy Cooperative (Dairy-Co), Quitman, Georgia;

(4) Kimball Dairy, Fitzgerald, Georgia;

(5) Thomasville Dairies, Thomasville, Georgia;

(6) Golden Glow, Inc., Albany, Georgia

thus giving to defendant a very substantial percentage of the milk processed and sold at wholesale in the State of

Georgia and affording to defendant processing plant outlets strategically located through the State;

(c) selling to plaintiff's customers outside the Columbus area at prices which were less than the defendant's cost to prevent plaintiff's successful expansion into Atlanta, Macon and Athens;

(d) arbitrarily selecting plaintiff as the only processor which could not itself haul milk from the Dairymen, Inc. producing farmers to its processing plant so as to deprive plaintiff of the profits normally associated with such hauling and to place it at a competitive disadvantage *vis-a-vis* its competitors, such as Golden Glow and Cherokee Farms, both of whom were permitted by defendant to continue to haul milk from Dairymen, Inc. producing members to their respective processing plants;

(e) entered into agreements with Atlanta Dairies, Better Maid Dairy Products, Inc., and Coweta Dairies to the effect that none of those dairies would sell any of their surplus milk to another processor without the consent of defendant Dairymen, Inc.;

(f) entered into agreements with Great Lakes-Southern Milk, Inc., a regional federation of cooperatives, to prevent the members of that federation from shipping milk into Georgia without Dairymen, Inc.'s consent, with full knowledge that plaintiff was securing milk from Tennessee producers at prices lower than the premium prices "imposed" on plaintiff and other Georgia processors by defendant;

(g) entered into agreements with Associated Standby Reserve Pool, a group of cooperatives, to prevent the members of that group from shipping milk into Georgia without the consent of defendant Dairymen, Inc.

(h) effectively precluding, by reason of the arrangements described with Atlanta Dairies, Coble Dairy Products

Cooperative, successor to Better Maid Dairy Products, Inc., Coweta Dairies, and Great Lakes-Southern Milk, Inc., plaintiff from access to milk at prices sufficiently low to permit it to bid competitively against defendant's processing plants for United States Government business, with the result that since 1970 defendant has substantially monopolized the United States Government bid business in Georgia available to it.

(i) by bringing in excess milk from North Carolina and Virginia and other points so as to prevent it from being sold to Georgia processors who would then be able to compete more effectively with defendant's processing plants;

(j) depressed the profits available through public schools in the Columbus area by lowering prices to unreasonably low levels particularly on chocolate milk since the time that product has been approved as part of the school milk program;

(k) by requiring Georgia based processors to buy milk from Dairymen, Inc. members at so-called "premium prices" which are imposed, without negotiation, by defendant so as to cover the exorbitant costs of operating Dairymen, Inc. in its unsuccessful effort to secure for its member farmers the prices established as fair, reasonable and compensatory by the Secretary of Agriculture under the aforementioned milk control orders;

(l) effecting agreements with other producers of milk that they will not furnish milk to processors who do not agree to take all or substantially all of their requirements of milk from defendant;

(m) preventing the delivery of milk by other producers to processors;

(n) requiring or attempting to require processors to take their full requirements, or substantially their full requirements of milk from the defendant and penalizing processors

failing or refusing to do so;

(o) requiring processors to contract for a set quantity of milk for a twelve-month period and penalizing processors failing or refusing to do so;

(p) manipulating the supply of milk by flooding the market in order to depress the price competing producers of defendant receive for their milk;

(q) restricting independent milk haulers from transporting the milk of independent producers;

(r) coercing and attempting to coerce producers to become and remain members under threat of loss of market; and

(s) entering into membership agreements which unreasonably restrict the right of members to withdraw and market their milk in competition with defendant.

20. The violations alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

VII.
EFFECTS

21. The violations in the complaint have had, or will have, the following effects, among others:

(a) processors who have signed supply contracts have been limited in their ability to choose between defendant and competing independent producers as sources of supply;

(b) processors who have refused to sign the aforesaid contracts either have been refused their usual purchases of milk or have been threatened by Dairymen, Inc. with a refusal to supply their requirements;

(c) independent producers have been and will be foreclosed from selling to processors whose purchases represent a substantial share of the market;

(d) independent producers have been and may be compelled to join defendant because of a decreasing number of outlets for their milk or because of inability to have their milk transported to market;

(e) members of defendant have been and may be prevented from withdrawing from membership and competing with defendant;

(f) the number of sources of supply to which processors may turn for their milk has been reduced and will be further reduced;

(g) independent producers have been and may be foreclosed from dealing with milk haulers who sign exclusive agreements with defendant;

(h) milk haulers have been and may be foreclosed from dealings with independent producers;

(i) competition among the defendant and other producers and cooperatives in the sale of milk and milk products has been restrained and eliminated;

(j) competition among the defendant and other processors and cooperatives in the sale of milk and milk products has been restrained and eliminated;

(k) sale of milk in the Dairymen, Inc. marketing area has been monopolized;

(l) producers have been denied unrestricted access to milk haulers;

(m) producers have been denied the unrestricted opportunity to sell milk to processors;

(n) plaintiff and other processors and haulers have been deprived of the benefit of free and open competition among producers; and

(o) plaintiff and other purchasers have been deprived of the opportunity to buy fluid milk and milk products in an unrestricted market and at competitive prices.

VIII.

INJURY TO PLAINTIFF

22. As a direct and proximate result of the violations of law recited herein and as intended by defendant, plaintiff has sustained damage in that:

(a) it has lost profits it would otherwise have made;

(b) it has sustained operating losses it would otherwise have avoided;

(c) it has lost substantial goodwill normally attached to a profitable enterprise; and

(d) it has lost a substantial part of the investment made in the expansion of its business.

Plaintiff cannot now measure these damages with sufficient specifity [sic] to allege the dollar amount thereof, but estimates such damages to be in the approximate amount of $1,675,000, before trebling. When plaintiff has sufficient information to permit it to allege, with specifity [sic], the quantum of its damages, plaintiff will ask leave of Court to amend its complaint to insert said sum herein.

IX.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the Court adjudge and decree that the defendant Dairymen, Inc. has engaged in combinations and conspiracies and unlawful price discrimination to unreasonably restrain and monopolize, and has unlawfully attempted to monopolize the aforesaid trade and commerce in violation of both Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2); Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13); and Section 3 of the Clayton Act (15 U.S.C. § 14).

2. That the Court adjudge and decree that the defendant Dairymen, Inc. violated Section 4 of the Agricultural Fair

Practices Act of 1967 (7 U.S.C. 2303);

3. That the defendant Dairymen, Inc., its successors, assignees, transferees, officers, directors, members, agents and employees and all persons acting or claiming to act on behalf thereof be permanently enjoined and restrained from:

(a) directly or indirectly, continuing, maintaining or renewing the unlawful combinations, conspiracies, price discriminations, and attempt to monopolize alleged in this complaint, or from engaging in any other combination or conspiracy having a similar purpose or effect, or from adopting or following any practice, plan, program or device having a similar purpose or effect;

(b) from discriminating or threatening to discriminate against the plaintiff in its purchases of milk, including but not limited to charging the plaintiff higher prices for milk produced by members of Dairymen, Inc. than that paid by plants of Dairymen, Inc. for milk produced by members of Dairymen, Inc.;

(c) from refusing to allow the plaintiff to haul milk from producers' farms who are members of Dairymen, Inc.;

(d) inducing, or attempting to induce the plaintiff to enter into any agreement, contract or understanding for the sale of milk;

(1) which requires, as a condition of such sale, that plaintiff purchase all or substantially all of its milk supply requirements from the defendant, or

(2) which limits or attempts to limit, in any manner, the sources of supply of milk from which the plaintiff may purchase, or

(3) which charges the plaintiff a higher price for the purchase of milk if he does not purchase his complete milk supply from defendant, or if he purchases milk from any supplier not a member of defendant;

(e) refusing to sell, or threatening to refuse to sell, to plaintiff any quantity of milk on the grounds that the plaintiff has not entered into any form of exclusive dealing arrangement with defendant;

(f) enforcing, or attempting to enforce any form of exclusive dealing arrangement with a milk processor; and

(g) giving preference, or continuing to give preference in the sale of milk to any milk processor who has previously entered into any form of exclusive dealing arrangement over any milk processor who has not entered into any such arrangement;

4. That plaintiff recover treble the amount of its damages by reason of the antitrust violations alleged herein, along with a reasonable attorney's fee and costs of suit;

5. For such other and further relief as to the Court may seem just and proper in the circumstances.

COUNT TWO

23. The Court has jurisdiction of the claim and cause of action set out in this Count Two under the doctrine of pendant jurisdiction because it is ancillary to the antitrust claims set out in Count One above and arises from the same transactions, circumstances and nucleus of operative fact as said antitrust claims.

24. Plaintiff hereby incorporates in this Count Two by reference the provisions of Paragraphs No. 1, 2, 3, 4, 9, 10, 11 and 13 of Count One above.

25. On or about January 12, 1972, plaintiff and defendant entered into and executed a certain Sales Agreement, which was later amended by agreement of the parties, a copy of which Sales Agreement, as amended, is hereto attached, marked Exhibit "A", and incorporated herein by reference. Said Agreement was extended by the parties for a period ending September 30, 1973. Said Exhibit "A"

was prepared by the defendant and the terms and provisions thereof were not negotiable.

26. Plaintiff has fully and faithfully performed all of its obligations under said Sales Agreement, as amended. During the period since January 12, 1972, plaintiff has been dependent upon and has relied upon defendant to supply milk pursuant to said Agreement. Approximately 60 per cent of plaintiff's milk supply has been furnished to it by defendant.

27. If defendant does not comply with its obligations and commitments under said Agreement, plaintiff will be unable to supply milk to its regular customers and defendant, through its various processors who compete with plaintiff, will fill the vacuum and will take plaintiff's customers away from plaintiff, thereby destroying plaintiff's milk business.

28. On or about June 5, 1973, defendant notified plaintiff of its intention unilaterally to increase the price of milk supplied by it to plaintiff, and proposed to plaintiff the execution of a certain supplemental agreement, copies of which notice and supplemental agreement are hereto attached, marked respectively Exhibits "B" and "C", and incorporated herein by reference as fully as if the same were set forth herein. Plaintiff refused to abrogate the said Sales Agreement, as amended, Exhibit "A", or to pay the unilateral price increase demanded by defendant.

On or about July 12, 1973, defendant notified plaintiff of its intention unilaterally to increase the price of milk supplied by it to plaintiff and proposed to plaintiff the execution of a certain supplemental agreement, copies of which notice and supplemental agreement are hereto attached, marked respectively Exhibits "D" and "E", and incorporated herein by reference as fully as if the same were set forth herein. Plaintiff refused to abrogate the said Sales

Agreement, as amended, Exhibit "A", or to pay the unilateral price increase demanded by defendant.

On August 1, 1973, two months prior to the termination of the Sales Agreement, as amended, Exhibit "A", defendant failed and refused to deliver milk to plaintiff as required by said Sales Agreement, as amended, unless plaintiff paid said proposed increased price and insisted upon plaintiff signing a waiver of its contract rights, a copy of said waiver being hereto attached, marked Exhibit "F", and incorporated herein by reference.

Plaintiff insisted upon its rights under said Sales Agreement, as amended, whereupon defendant failed and refused to deliver to plaintiff milk then due under said Agreement, and thereby committed a material breach thereof.

29. On information and belief, plaintiff alleges that defendant will continue to breach said Sales Agreement, as amended, and will fail and refuse to deliver milk to plaintiff under said Agreement in accordance with the terms thereof.

30. So long as defendant continues to breach said Sales Agreement, as amended, plaintiff will be damaged thereby, but plaintiff is not presently able to quantify the amount, nature and extent of such damages. However, plaintiff alleges that its milk business, which defendant seeks to destroy, has a fair market value in excess of $1,000,000.00. As defendant well knows, plaintiff has numerious contracts with its customers to supply them milk. Plaintiff will be unable to obtain the milk necessary to supply its customers and to perform said customer contracts unless defendant carries out its aforesaid contractual obligations to plaintiff.

31. Plaintiff is being and will be immediately and irreparably damaged by defendant's continuing breaches of said Sales Agreement, as amended.

32. Plaintiff has no adequate remedy at law.

33. In the matters herein set forth, defendant has acted in bad faith; its breach of said Sales Agreement, as amended, has been arbitrary, capricious and without basis or foundation; it has been litigious; and it has put plaintiff to unnecessary trouble and expense. The conduct of defendant, as herein described, has been willful and it constitutes duress, extortion, and coercion. The purpose of defendant's said willful and illegal acts is to destroy plaintiff's business, to take over plaintiff's customers, and to monopolize the milk business in the State of Georgia.

WHEREFORE, plaintiff prays:

(1) That defendant, its officers, directors, employees, servants, agents, members, haulers, subsidiary corporations, independent contractors, successors, assigns, transferees, and all parties acting for, by, through or in concert with them, or any of them, be immediately restrained and temporarily and permanently enjoined from:

(a) Breaching said sales agreement as amended in any manner or respect whatever at any time prior to October 1, 1973;

(b) charging, demanding from or accepting in payment more than $8.28 per hundredweight for milk testing 3.5% butterfat used in Class I for milk furnished or delivered by defendant to plaintiff under said sales agreement as amended;

(c) delivering, at any time prior to October 1, 1973, any less or different quantities of milk to plaintiff, or at different times or places, than the quantities and at the times and places specified in or pursuant to the express terms of said sales agreement as amended.

(2) That plaintiff do have and recover from defendant damages in the amount of $1,000,000;

(3) that plaintiff do have and recover from defendant its expenses of litigation, including without limitation at-

torneys' fees in the amount of $25,000;

(4) that the issues raised in this Count Two be tried by jury at the September, 1973 Term of this Court;

(5) for such other and further relief as to the Court may appear mete and proper.

DATED:

HATCHER, STUBBS, LAND, HOLLIS & ROTHSCHILD
ALBERT W. STUBBS
BLECHER, COLLINS & HOECKER
MAXWELL M. BLECHER
HAROLD R. COLLINS, JR.
ROBERT COCHRAN
By /s/ Albert W. Stubbs
Attorneys for Plaintiff

EXHIBIT "A".

SALES AGREEMENT

THIS AGREEMENT made in the City of Decatur, State of Georgia, on the 12th day of January, 72 by and between DAIRYMEN, INC., a cooperative corporation organized and existing under the laws of the State of Kentucky, with its principal office and place of business at 3941 Buechel Bank Road, Louisville, Jefferson County, Kentucky (hereinafter called "Seller") and the KINNETT DAIRIES, INC., of Columbus City, State of Georgia, with its principal office and place of business located at Sixth Avenue, Columbus, Muscogee County, Georgia (hereinafter called "Buyer"),

WITNESSETH:

WHEREAS, the Buyer is engaged in the distribution of milk and milk products at the wholesale, retail, or consumer level; and

WHEREAS, the parties are desirous of establishing arrangements whereby the Buyer will purchase raw milk from the Seller, and

WHEREAS, the Seller is the marketing and bargaining agent for its various dairy farmer members and will supply Buyer with raw milk on the terms hereinafter stated to the end that the stability and standards of the fluid milk business and permanent relations by and between the parties hereto may be established and maintained; and

WHEREAS, it is to the mutual advantage of Seller and Buyer to have a clear understanding of the terms of trade clearly set forth prior to doing business,

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto agree mutually with the other, as follows:

1. *Volume of Milk to be Sold and Purchased*

(a) Beginning on the effective date of this Agreement, and continuing through the term hereof, Seller shall sell to Buyer, and Buyer shall purchase from Seller not less than *28,313,000* pounds of Grade A milk for Buyer's milk plant. The total quantity of milk ordered for each calendar month of the term hereof shall be not less than the quantity indicated for each month as shown in Exhibit A attached hereto.

During any month in which Buyer's milk needs for processing at Buyer's plant is less than the amount shown on Exhibit A for the month, the Buyer shall reduce purchases from Seller in the same proportion as other sources of producer milk. The terms "producer milk" as used in this Agreement shall have the meaning as presently defined in Federal Market Order No. 7. The Buyer agrees to authorize the Market Administrator of Federal Order No. 7 to furnish information to Seller to verify a pro rata reduction of purchases. During any month that the reduction in purchases from Seller and from other sources are not substantially pro rata, then the charges as set in paragraph 4 and Exhibit C shall apply.

Insofar as possible raw milk for Buyer shall be milk of member producers located in the counties listed in Exhibit B attached hereto and made a part hereof.

(b) Buyer shall have the option of receiving said milk from Seller on the basis of 4, 5, 6, or 7 days per week. Buyer shall inform Seller on Friday of requirements and deliveries scheduled for the following week. Volume adjustments in weekly orders may be made on forty-eight (48) hours' notice.

(c) To the fullest extent possible, Seller shall deliver milk directly to Buyer's plant in bulk tankers, directly from assigned producer farms, using the sum of each farmer's

weight, determined by the reading of the measuring stick in each farmer's bulk tank to determine the total weight of milk in each tank load. However, when it is necessary that milk be delivered by Seller from one of its plants wherever located (hereinafter referred to as "Seller's plant") to Buyer's milk plant, weights will be determined by the Seller.

The Buyer shall have the right to check weights of loads of milk, at his expense, and whenever differences in the weights determined by the Seller differ from those obtained by the Buyer, by more than 0.5 percent, the Buyer shall inform Seller immediately of such differences. Seller shall take action promptly to bring the delivery weights of milk within the allowable tolerance.

2. *Delivery and Hauling Risk:* Delivery shall not be deemed to have been made to Buyer's milk plant until hose is connected to the tanker and the valve has been opened. All risks relative to product prior to such delivery shall be those of the Seller.

It is understood that the Seller will direct the delivery of milk to the Buyer's plant daily at the very earliest time within reason and in as few truck loads or tank loads as are expedient and as existing conditions will permit; and all arrangements and contracts with haulers and truckmen for the pickup, weighing and sampling of milk at the farm and the transportation thereof to the Buyer's plant shall be made, negotiated, arbitrated, and/or determined by the Seller.

3. *Prices, Service Charges, and Payment:*

(a) The price of milk delivered shall be as hereinafter set out, to wit:

(i) The price of Class I milk shall be in accordance with the Seller's pricing program currently in effect, a copy of which is attached hereto and made a part thereof and marked Exhibit D, and applicable to milk sold to

handlers fully regulated under Federal Milk Marketing Order No. 7; provided, however, that in the event the Minnesota-Wisconsin Price Series as announced by the U. S. Department of Agriculture reaches the level of $4.92 per cwt. for 3.5% milk, then there shall be an increase of 13 cents per cwt. on the prevailing Class I price, effective on the first day of the following month; then for each 15 cents per cwt. increase or decrease above or below the level of $4.92 in the said Minnesota-Wisconsin Price Series for milk containing 3.5% butterfat, the prevailing Class I price shall be adjusted as follows:

MINNESOTA-WISCONSIN PRICE SERIES BRACKETS	ADJUSTMENT OF PREVAILING CLASS I PRICE	RESULTING CLASS I PRICE
$4.92 but less than $5.07	+ 0 cents	$7.53
5.07 but less than 5.22	+ 15	7.68
5.22 but less than 5.37	+ 30	7.83
and etc. and		
$4.92 but more than $4.77	− 0 cents	$7.53
4.77 but more than 4.62	− 15	7.38
4.62 but more than 4.47	− 30	7.23

In case the basic formula price for figuring Federal Order prices is subsequently changed to other than the Minnesota-Wisconsin Series, then the aforesaid method of adjusting the price shall be re-negotiated.

(ii) The price for milk other than that used for Class I shall be the applicable Federal Order price. In the event the average price paid for manufacturing milk in the Minnesota-Wisconsin area as announced by the U. S. Department of Agriculture reaches or exceeds the level of $4.92 per cwt., the price for milk utilized in Classes other than Class I shall be the applicable Federal Order price plus 8 cents per cwt. Such 8 cents per cwt. shall apply only to milk utilized at Buyer's plant. Should the Federal Order Number 7 classifica-

tion of milk products be changed during the term of this contract to provide for allocation of products now classified in Class I and Class II to a reallocation of classification to three Classes, this sales agreement shall be reopened for purposes of negotiating the price of milk allocated in Classes other than Class I.

If, after the reclassification to three Classes, the Class II price is established at 15 cents per cwt. above the Minnesota-Wisconsin Price Series, or higher, the 8 cents above the Minnesota-Wisconsin Series shall not apply to products classified as Class II. If the U. S. Department of Agriculture should determine that formulas other than the Minnesota-Wisconsin Price Series is established as a basis for pricing, then this contract may be reopened by either party.

(iii) *Butterfat Differentials:* The foregoing Class prices shall be subject to the applicable butterfat differential under the applicable Federal Milk Marketing Order for the period herein involved.

(iv) *Location Adjustments:* The foregoing Class prices shall also be subject to the applicable location adjustments as determined under the applicable Federal Marketing Order for the period herein involved.

(v) *Armed Service Contracts:* The Class I price for milk used to fulfill United States Armed Service contracts shall be quoted and confirmed in writing by Seller at request of Buyer. This price for milk delivered for use to fulfill such United States Armed Service contract shall not be changed during the term of such United States Armed Service contract.

(b) *Services Rendered by Seller:* Specifically, the Seller shall render the following services:

(i) Non-brand advertising of milk and other dairy products, promotion, education, and research for an on behalf of the milk industry.

(ii) Supplying quantities of milk as per weekly schedule of orders from Buyer.

(iii) Disposing of any surplus above quantities needed by Buyer for plant use.

(iv) Providing field services necessary to insure a quality product.

(v) Assure that all milk delivered to Buyer meets all applicable Quality Standards in effect in area where Buyer makes sales of packaged milk.

(vi) Responsibility for, direction of, and assignment of member-producers to all farm pickup haulers assigned to deliver milk to Buyer's plant.

(vii) Laboratory services on individual member-producers and all farm pickup tankers of milk assigned as supply to Buyer's plant.

(viii) Determination of butterfat test on each individual producer-member of Seller assigned to the Buyer's plant.

(ix) Preparation of individual producer payroll checks and payment of individual producer for milk delivered to Buyer's plant.

(c) *Receiving Schedule Charge*: This provision becomes effective on the date this Agreement is signed. If the Buyer receives milk only four (4) days or less per week, the Buyer shall pay to the Seller an additional charge of 8 cents per cwt. on all milk received at Buyer's milk plant from Seller; if the Buyer receives milk only five (5) days per week, then the Buyer shall pay to the Seller an additional charge of 5 cents per cwt. on all such milk. For the purpose of this paragraph, the number of days of receipt shall exclude those days on which the daily receipts from Seller are more than 30% below the average daily receipts for the week. (In computing the percentage, any volume of milk ordered by Buyer but not delivered by Seller on the day specified shall be treated as a receipt.) If Buyer purchases 95% or

more of his total supply from Seller, then the above charge on 5-day delivery shall not apply.

(d) *Payment*: Buyer shall remit payments to Seller pursuant to this Agreement at the times and dates as specified in the applicable Federal Milk Marketing Order.

(e) *Modifications*: Any modifications or exceptions in, or additions to, this Agreement shall be made in writing and agreed to by the parties hereto.

4. *Price Cost Equalization Charge*: Seller shall dispose of all quantities of its surplus milk not needed by the Buyer for his plant. For this service, Buyer shall pay Seller a basic cost equalization charge, as set forth in Exhibit C hereto, in the event the quantities of milk that are reduced in purchases from Seller and from other sources are not substantially pro rata as provided in paragraph 1(a) of this Agreement. This cost equalization charge is to be paid monthly and is to be calculated according to EXHIBIT C attached hereto.

5. *Quality Standards*: Seller warrants that all milk delivered to Buyer's milk plant shall meet the Grade A requirements of the United States Public Health Service, the State Health Department, the applicable City Health Department, and other similar regulatory bodies in states where milk is produced and sold; and shall conform to the applicable Federal Food, Drug, and Cosmetic Act and laws and regulations.

The Seller agrees to work with the Buyer to develop milk of a quality for the Buyer's use consistent with the buyer's quality program since such program is believed to be one that would be beneficial in improving shelf life of finished products and should contribute to more sales of milk and dairy products.

6. *Emergency Supply*: It is understood that in case of a short supply of milk, the Seller agrees to pro rate the production of its members in the particular marketing area on the basis of the requirements for Class I sales with each and every regular buyer of milk as near as is possible to do so, and, in case of being unable to supply milk from locally produced sources, it will be the duty of the Seller to import milk of its members from other areas, or from other sources.

7. *Other Emergencies*: In the event either party is prevented or delayed from making the aforementioned deliveries or performing any other duty required by this Agreement due to fire, strike, drought, acts of God, epidemics or disease, orders, rules or regulations or acts of government relating to national defense or prosecution of war, lack of manpower due to war conditions, or other causes beyond the control of either, that party shall not be liable for damages resulting therefrom.

8. *Favored Nation Clause*: Seller represents that the terms and conditions, including price, of this Agreement are comparable to the terms and conditions offered to other purchasers competing in the same Federal or State Marketing Order regulating Buyer's plant covered by this Agreement; and Seller agrees that in the event any such other purchaser (including a member, subsidiary, or affiliate of Seller's cooperative association) is at any time offered terms and conditions different than those offered the Buyer hereunder, then Seller shall offer Buyer such terms and conditions, it being the intent of this section to assure the Buyer the most favorable terms and conditions which Seller at any time is selling milk to other purchasers in the Federal or State Order in which Buyer's plant covered by this Agreement is regulated.

9. *Term of Agreement*: This Agreement shall become effective on October 1, 1971, and shall continue for one

year and shall be extended from year-to-year for successive years, until either party shall have given notice in writing of its intention not to renew not more than seventy-five (75) days or less than sixty (60) days prior to any anniversary date hereof.

10. *Binding Effective of Agreement*: This Agreement is not binding until it is signed by a duly authorized official of Buyer and approved and accepted by a duly authorized official of Seller and duplicate originals of the same delivered to each other.

DAIRYMEN, INC.

BY Frank H. McDowell
Assistant Secretary

/s/ W. J. Smith Jr.
WITNESS

/s/ Kinnett Dairies Inc.
BUYER'S NAME

BY John R. Kinnett, Jr.
Pres.

/s/ (illegible)
WITNESS

ADDENDUM NO. 1
TO SALES AGREEMENT
KINNETT DAIRIES, INC.

Notwithstanding anything herein contained to the contrary, during a period of a price freeze or price control imposed by the United States Government, including, but without limitation, the present price control under Executive Order 11627, as supplemented or amended by subsequent Executive Orders, regulations, interpretations and the like, it is agreed that Class I milk price hereunder shall not increase except to the extent that Buyer increases its prices on Class I finished products pursuant to price commission approval (or approval of any other duly authorized agency) based upon the proposed increase of such Class I price.

ADDENDUM NO. 2
TO SALES AGREEMENT
KINNETT DAIRIES, INC.

Notwithstanding the provisions of paragraph 1(c) with respect to the Seller using farm weights of the milk delivered, the present program of the Seller marketing milk to Buyer pursuant to Section 13(d) of Georgia Order No. 7 will be continued so long as this program is satisfactory to both Buyer and Seller.

EXHIBIT A

KINNETT DAIRIES, INC.

SCHEDULE OF MONTHLY QUANTITIES

(in thousands of pounds)

	MONTH	CIVILIAN	MILITARY	SUB TOTAL	ADDED VOLUME	TOTAL
1.	Oct	1,409	1,565	2,974		2,974
	Nov	1,350	1,550	2,900		2,900
	Dec	899	1,550	2,449	900	3,349
2	Jan	1,087	1,550	2,637	700	3,337
	Feb	773	880	1,653	675	2,328
	Mar	826	950	1,776	700	2,476
	Apr	915	950	1,865	675	2,540
	May	682	900	1,582	700	2,282
	June	545		545	675	1,220
	Jul	706		706	700	1,406
	Aug	926		926	700	1,626
	Sep	1,200		1,200	675	1,875
		11,318	9,895	21,213	7,100	28,313

In the event Buyer's Class I fluid sales should decrease as much as five percent (5%) from such sales volume in January, 1972 (exclusive of possible adjustments already considered, then an appropriate reduction shall be made in the monthly volumes above.

EXHIBIT B

MEMBERS ASSIGNED TO KINNETT DAIRIES, INC.

Roy Butts, Route 2, Pine Mountain, Georgia 31822
Robert C. Hamer, Route 2, Pine Mountain, Georgia 31822
Charles W. Hunt, Route 2, LaGrange, Georgia 30240
Jeff-Co Dairy of Georgia, Inc., Box 237, Richland, Georgia 31825
John K. Murphy, Route 2, Pine Mountain, Georgia 31822
Raymond A. Ramsey, Rt. 4, Box 262, Phenix City, Alabama 36867
Vernon Sanders Dairy #1, Forsyth, Georgia 31029
E. J. Satterfield, Route 1, Americus, Georgia 31709
Clyde P. Smith, Route 1, Andersonville, Georgia 31711
St. John Dairy, Route 2, Ellaville, Georgia 31806

EXHIBIT C

KINNETT DAIRIES, INC.

BUYER COST EQUALIZATION CHARGE

1. Multiply the volume of milk not physically received (the difference between quantity shown in Exhibit A for the month and milk physically received) by the Buyer's percentage of producer milk utilized in Class I;
2. Multiply the results obtained in 1 above by a factor obtained by subtracting the percent of producer milk normally received from D.I. from 100%;
3. Multiply the results obtained in 2 above by the difference in the D.I. Class I price and the Federal Order No. 7 minimum Class I price, but not less than 30 cents per hundredweight.

EXHIBIT D

August 14, 1970

Mr. John R. Kinnett, Jr., President
KINNETT DAIRIES, INC.
P. O. Box 357
Sixth Avenue
Columbus, Georgia 31906

Re: Price Announcement

Dear Mr. Kinnett:

This notice is given pursuant to authority and direction of the Board of Directors of Georgia Milk Producers Cooperative Association, Inc. to all pool handlers regulated under Order No. 7 who are receiving milk delivered from the farms of our members. This is to advise you that, effective as of September 1, 1970, and to continue until further notice, subject to change only by notification in writing to you, the Class I price of milk received directly from our members regularly assigned to you shall be:

1. (a) Plant Location, Northern Zone — Georgia Marketing Area — $7.25 per cwt.

   (b) Plant Location, Southern Zone — Georgia Marketing Area — $7.40 per cwt.

   Subject to the Class I butterfat differential as determined under Federal Milk Marketing Order No. 7 for the period herein involved, or

2. The Federal Order Class I price (pursuant to Section 51 (a) of Order No. 7) as announced by the Market Administrator, whichever is the higher, for 3.5 percent butterfat content with a butterfat differential for milk testing above or below 3.5 percent at the same rate as is provided in Section 52 (a) of Order No. 7

For the purpose of determining the percentage and volume of milk receipts from our members which is subject to the

foregoing Class I pricing arrangement, the milk received from the members of our Association shall be treated on a pro rata basis of your total producer milk received during the month.

Milk which is used in fulfillment of a military contract which was entered into prior to the date of receipt of this letter will continue to be priced upon the same basis as it is now priced, but all milk which is used in the fulfillment of military contracts which are entered into with the Federal Government or any of its instrumentalities after the date of the receipt of this letter will be priced upon the same basis as other milk and in accordance with the first paragraph of this letter.

The acceptance of the milk deliveries of our members on and after September 1, 1970, shall be deemed to have been received by you and subject to, and in accordance with the above quoted price for which payment is to be made at the same time and in the same manner as payments would otherwise be required to be made under the provisions of Federal Milk Order No. 7. If any revisions are to be made in the sale of our members product, you will be advised of any such revisions in writing. Otherwise, the price arrangement hereunder is to remain in full force and effect.

Very truly yours,
GEORGIA MILK PRODUCERS
COOPERATIVE ASSOCIATION, INC.

_____
President

_____
General Manager

[Letterhead]

GEORGIA DIVISION
Dairymen, Inc. PHONE (404) 482-7406
LOCATION: 6400 HILLANDALE ROAD, LITHONIA
MAILING ADDRESS: P.O. BOX 1287, DECATUR, GEORGIA 30031

November 11, 1972

Mr. John R. Kinnett, Jr. President
Kinnett Dairies, Inc.
P.O. Box 351
Columbus, Georgia 31902

Dear John:

The Sales Agreement dated January 12, 1972 between Kinnett Dairies, Inc. and Dairymen, Inc. is amended with respect to the schedule of monthly quantities of milk to be supplied by Dairymen Inc., exclusive of milk for military purposes, as follows:

	Period	Quantity (000 lbs.)
1972	Oct.	3,150
	Nov.	2,630
	Dec.	2,620
1973	Jan.	2,775
	Feb.	2,460
	Mar.	2,740
	Apr.	2,510
	May	3,000
	June	2,980
	July	3,060
	Aug.	3,100
	Sept.	3,420
	TOTAL:	34,445

Milk currently supplied for military purposes is set out in a separate document, and quantities for future contracts will be agreed upon prior to the contract period.

Very truly yours,

DAIRYMEN, INC.

/s/ Frank H. McDowell
Frank H. McDowell, Manager
Georgia Division

Accepted:

/s/ John R. Kinnett, Jr.
John R. Kinnett, Jr.

EXHIBIT "B".

[Letterhead]

Dairymen, Inc.
GEORGIA DIVISION
PHONE (404) 482-7406
LOCATION: 6400 HILLANDALE ROAD, LITHONIA
MAILING ADDRESS: P.O. BOX 1287, DECATUR, GEORGIA 30031

June 5, 1973

Mr. John R. Kinnett, Jr., President
Kinnett Dairies, Inc.
P. O. Box 357
Columbus, Ga. 31906

Dear Mr. Kinnett:

Within the past two weeks we have discussed with you or your representative, the necessity of amending the Sales Agreement between Dairymen, Inc., and your company. In order to remain competitive in the procurement of milk supplies and to assure you and our other customers of an adequate supply of milk, it is necessary to amend the Class I pricing provisions of our Agreement with you effective July 1, 1973.

Our dairy farmer members are caught in a severe cost-price squeeze with the ever increasing costs of labor, farm machinery, and equipment, supplies, services, taxes, insurance, and especially, feed costs, which have more than doubled in price from a year ago. (The enclosed information emphasizes this drastic situation.) This cost-price squeeze has caused over 1.0% of our dairy farmer members to sell out of business in March of this year and over 1.1% to quit in April of this year. Milk production has declined and is continuing to decline, both nationally and in the Southeast. At the same time, sales of milk and dairy products continue to expand.

Because of the above factors and in order to assure an adequate supply of milk, and to give you as much advance notice as possible, this letter confirms our earlier discussions with you about a price increase effective July 1, 1973, to the effect that the price of milk received from Dairymen, Inc., members on and after that date will be $8.71 (including handling charge) per hundredweight for 3.5% butterfat milk utilized in Class I per Federal Milk Marketing Order No. 7, which regulates the handling of milk in the Georgia marketing area. However, in no event shall the price for Class I milk be less than the applicable Federal Order Class I price. All other provisions of the Sales Agreement heretofore executed between your company and Dairymen, Inc., will remain in effect through September 30, 1973.

Enclosed please find a copy of the Supplemental Agreement which confirms our discussions about this price increase. We will discuss this matter further with you and arrange to receive an executed copy of this Supplemental Agreement.

We appreciate you cooperation in helping to ameliorate a significant problem facing the entire dairy industry. Maintaining the basic productive capacity of the dairy industry is necessary for a progressive and viable industry, now more than ever, and especially in the future.

Very truly yours,

DAIRYMEN, INC., GEORGIA DIVISION

/s/ Frank H. McDowell

Frank H. McDowell

Manager

FHMcD:ab

Enclosures

EXHIBIT "C".

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement dated this _____ day of _____ , 1973, by and between the parties hereto, hereby amends and extends the Sales Agreement dated _____ between Dairymen, Inc. and _____ .

Subparagraph (i) of Paragraph 3(A) of this Sales Agreement is hereby amended in the following particulars, to-wit:

> "The Class I price (including handling charge) effective for the period of July 1, 1973, through September 30, 1973, shall be $8.71 per hundred-weight for milk testing 3.5 percent butterfat"

All other language and provisions of said Agreement to the extent such are not in conflict with this Amendment shall remain in full force and effect until September 30, 1973.

The parties agree each with the other that in the event they negotiate a Sales Agreement setting forth the terms of trade for a period after September, 1973, that the Class I price (including handling charge) shall be not more than $8.86 per hundredweight for milk testing 3.5% butterfat for the period of October 1, 1973, through August 31, 1974; provided, however, that should the Minnesota-Wisconsin Series Price reach $6.12 per hundredweight, for milk testing 3.5% butterfat, then the Class I price under such Sales Agreement shall be re-negotiated by the parties hereto.

This agreement is not binding until it is signed by a duly authorized official of Buyer and approved and accepted by a duly authorized official of Seller and duplicate originals of the same delivered to each other.

DAIRYMEN, INC.
BY _____

_____
WITNESS

_____
BUYER'S NAME
BY _____

_____
WITNESS

EXHIBIT "D".

[Letterhead]

Dairymen, Inc.
GEORGIA DIVISION
PHONE (404) 482-7406
LOCATION: 6400 HILLANDALE ROAD, LITHONIA
MAILING ADDRESS: P.O. BOX 1287, DECATUR, GEORGIA 30031

July 12, 1973

TO: ALL HANDLERS IN GEORGIA FEDERAL ORDER NO. 7 MARKETING AREA AND OTHERS SUPPLIED BY DAIRYMEN, INC. — GEORGIA DIVISION

Gentlemen:

On June 5, 1973, we wrote you relative to the necessity for the amendment of our Sales Agreements in order to remain competitive in the procurement of milk supplies and to assure you and our other customers of an adequate supply of milk. In that letter, we pointed out that our dairymen were selling out of business at a rate of 1 percent per month and this rate of "sell out" of herds has increased progressively each month since March, and has drastically increased since the President's Price Freeze announcement of June 13, 1973.

The price increase planned for July 1, 1973 was not made effective because of the fact that the current freeze program did not permit a pass-through provision for raw agricultural products. We are hopeful for a revision of this price freeze program by the Cost of Living Council no later than August 12, 1973 — the end of the 60-day freeze period. Dairy farmers have been unable to pass through all of the higher feed and other production costs that have occurred since November, 1972. These farmers have had to absorb these higher costs for another thirty-one days in July after thay had expected minimal relief from the planned price increase.

The Minnesota-Wisconsin Series Price for the month of June, 1973, averaged $5.73 for milk containing 3.5 percent butterfat. Under the terms of our Sales Agreement — this Minnesota-Wisconsin Series Price level would trigger an increase of 15 cents per hundredweight, effective August 1, 1973. Due to the tremendous cost-price squeeze in which our dairy farmers find themselves (which has increased tremendously because protein supplements doubled in price since May 1, 1973, and are approximately four times as high as they were a year ago), and as we have discussed with you during the past month and a half, we feel that in order to assure you and our other customers an adequate supply of milk, it will be necessary to amend the Class I price provisions of our Agreement, effective August 1, 1973.

In order to give you as much notice as possible, this letter is consistent with our earlier letters and discussions regarding a price amendment to our present Sales Agreement effective August 1, 1973. Pursuant to the Supplemental Agreement, the price of milk received by you from Dairymen, Inc. on and after that date will be $8.86 per hundredweight, including the present eight cent service charge, for 3.5 percent butterfat milk utilized in Class I for milk sold in the Georgia Marketing Area; however, in no event shall the price of Class I milk be less than the applicable Federal Order Number 7 Class I price. All other provisions of the Sales Agreement heretofore executed between your company and Dairymen, Inc. will remain in effect through September 30, 1973.

Enclosed please find a copy of the Supplemental Agreement which confirms our discussions about this price increase. We will discuss this matter further with you and arrange to receive an executed copy of this Supplemental Agreement.

We appreciate your cooperation in helping to ameliorate a significant problem facing the entire dairy industry. Maintaining the basic productive capacity of the dairy industry is necessary for a progressive and viable industry, and is in the public interest.

Very truly yours,

DAIRYMEN, INC.

/s/ Frank H. McDowell
Frank H. McDowell, Manager
Georgia Division

FHMcD:bh
Enclosure

EXHIBIT "E".

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement dated this _____ day of _____, 1973, by and between the parties hereto, hereby amends and extends the Sales Agreement between Dairymen, Inc. and the _____ _____, entered into on _____ .

Subparagraph (i) of paragraph 3(a) of this Sales Agreement is hereby amended in the following particulars, to-wit:

> "The Class I price effective for the period of August 1, 1973, through September 30, 1973, shall be $8.86 per hundredweight for milk testing 3.5 percent butterfat."

All other language and provisions of said Agreement to the extent such are not in conflict with this amendment shall remain in full force and effect until September 30, 1973.

The parties agree, each with the other, that in the event they negotiate a Sales Agreement setting forth the terms of trade for a period after September, 1973, that the Class I price shall be $8.86 per hundredweight (including an 8 cent per hundredweight service charge) for milk testing 3.5 percent butterfat for the period of October 1, 1973 through August 30, 1974, provided however, that should the Minnesota-Wisconsin Series Price reach $6.12 per hundredweight for milk testing 3.5 percent butterfat, then the Class I price under such Sales Agreement shall be renegotiated by the parties thereto.

SELLER - DAIRYMEN, INC.

By _____

_____

WITNESS

_____

BUYER

BY _____

_____

WITNESS

EXHIBIT "F".

Date: 8-1-73

Delivery accepted at Dairymen, Inc's pricing program currently in effect to competing handlers based on $8.86 per hundredweight for milk testing 3.5% butterfat used in Class I.

_____

Signature

REMARKS _____

_____

DIVISION COPY

GEORGIA, MUSCOGEE COUNTY.

Personally appeared before me, the undersigned attesting witness, John R. Kinnett, Jr. who, first being duly sworn, deposes and on oath says that the allegations of fact contained in the foregoing Complaint are true and correct.

This the 2nd day of August, 1973.

/s/ John R. Kinnett, Jr.
John R. Kinnett, Jr.

Sworn to and subscribed before me
this the *2nd* day of August, 1973:

/s/ Albert W. Stubbs
Notary Public, Muscogee County,
Georgia

I, ALBERT W. STUBBS, counsel for Kinnett Dairies, Inc., plaintiff, certify that no efforts have been made to give notice to defendant that plaintiff would seek a temporary restraining order. Notice should not be required because of the emergency created by the refusal of defendant, at approximately 6 P. M., August 1, 1973, to deliver milk to plaintiff as required by said Supplemental Agreement as amended, thereby making it impossible for plaintiff to supply its milk customers. The milk business is a daily business, requiring daily delivery to customers.

DATED August 2, 1973.

/s/ Albert W. Stubbs
Albert W. Stubbs

APPENDIX B.

Order to Show Cause and Temporary Restraining Order.

United States District Court, Middle District of Georgia, Columbus Division.

Kinnett Dairies, Inc., Plaintiff, v. Dairymen, Inc., Defendant. No. 1701.

Filed: August 2, 1973.

Upon the verified complaint and the certificate of Albert W. Stubbs, attorney for the plaintiff, attached to the complaint, it is

ORDERED that the defendant, Dairymen, Inc., show cause before this Court at Columbus, Georgia, on Tuesday, August 7, 1973, at 10:00 O'Clock A. M. Eastern Daylight Time, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein, enjoining the defendant, its officers, directors, employees, servants, agents, members, haulers, subsidiary corporations, independent contractors, successors, assigns, transferees, and all parties acting for, by, through or in concert with them, or any of them, from:

(a) Breaching said sales agreement between defendant and plaintiff, dated January 12, 1972, as amended in any manner or respect whatever at any time prior to October 1, 1973;

(b) charging, demanding from or accepting in payment more than $8.28 per hundredweight for milk testing 3.5% butterfat used in Class I for milk furnished or delivered by defendant to plaintiff under said sales agreement as amended;

(c) delivering, at any time prior to October 1, 1973, any less or different quantities of milk to plaintiff, or at different times or places, than the quantities and at the times

and places specified in or pursuant to the express terms of said sales agreement as amended; and it is further

ORDERED that this Order expire within 10 days after entry unless within such time the Order for good cause shown is extended for a like period, or unless the defendant consents that it may be extended for a longer period; and it is further

ORDERED that service of this Order to show cause together with a copy of the papers hereto attached on defendant Dairymen, Inc. on or before 6:00 O'Clock P. M. Eastern Daylight Time, Saturday, August 4, 1973, be deemed sufficient service; and it is further

ORDERED that the complaint, summons and this Order may be served by any sheriff of the State of Georgia, or his deputy, all such persons being hereby specially appointed by the Court for that purpose.

ISSUED at 1:45 P. M., Eastern Daylight Time, August 2, 1973.

/s/ J. Robert Elliott
United States District Judge

MOTION FILED
JAN 23 1984

No. 83-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KINNETT DAIRIES, INC.,

Petitioner,

v.

DAIRYMEN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit.

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the conduct and acts of a Capper-Volstead cooperative, once formed and operating, are to be judged under the Sherman Act as would those of a business corporation, union or other independent entity recognized by law as a person?

2a. Whether joint agreements and conduct between legally distinct cooperatives is relevant and should be given great evidentiary weight in consideration of Section 2 Sherman Act counts?

b. Whether a higher and undefined standard of proof of "predatory" conduct is required in Section 2 Sherman Act cases challenging conduct of Capper-Volstead cooperatives possessing a dominant or overwhelming share of the markets?

3. Whether the conflict between a majority of Circuits squarely rejecting a "predatory" standard in Sherman Act Section 2 cases involving Capper-Volstead cooperatives (Sixth/Eighth/Ninth) and a minority of Circuits adopting it (Second/Eleventh) creates such chaos in administering the law, cooperatives and markets for basic foodstuffs as to compel this Court to grant the Petition and settle the issue?

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OCTOBER TERM, 1983

No. 83-1039

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

The National Independent Dairy-Foods Association (NIDA), through counsel, respectfully moves this Court, pursuant to Rule 36 of the Supreme Court Rules, for leave to file as an *amicus curiae* its attached brief in support of the petition for writ of certiorari, consent by respondent having been refused. In support movant states as follows:

1. NIDA is a non-profit, non-stock corporation organized and chartered under Delaware law as a trade association to advance the interests and general welfare of all persons engaged in the processing, manufacturing, production, distribution and sale of dairy products; to encourage ethical principles, fair dealing and honorable practices and other general business standards beneficial to the dairy industry; and to work for and encourage the elimination of unfair trade practices.

2. NIDA, by virtue of its national perspective and membership, is able to offer information and views not available to

the Court from the parties, and submits that its views are important to the interests of all independent, non-exempt handlers and processors of agricultural commodities.

3. In addition, independent dairy farmers compete with large cooperatives to supply independent processors. Their viewpoints may not be adequately presented. NIDA raises particular issues of concern to independent farmer producers that otherwise may not be brought to the attention of this Court.

WHEREFORE, the National Independent Dairy-Foods Association respectfully prays this Court for leave to file its brief submitted herewith as an *amicus curiae* in support of the petition for certiorari.

January 23, 1984

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Eleventh Circuit dated September 19, 1983, for which review is sought herein is reported at 715 F.2d 520 (11th Cir. 1983).

The opinion of the District Court for the Middle District of Georgia, in which the case was tried, is dated March 10, 1981 and is reported at 512 F. Supp. 608 (M.D. Ga. 1981).

STATUTES INVOLVED

Section 2 of the Sherman Act (15 U.S.C. § 2), and Section 1 of the Capper-Volstead Act (7 U.S.C. § 291) are set forth in the Petitioner's brief in Appendix F (pp. 102-103), and are incorporated as if reprinted herein.

INTEREST OF AMICUS CURIAE

NIDA's members are independent proprietary (non-cooperative) dairies which package fluid milk, manufacture ice cream, cheese and other products and market them from facilities in thirty-six states. NIDA is the largest association of independent proprietary dairies. Approximately one-third of these members operate in the relevant market area in this proceeding. Members purchase raw milk from individual dairy farmers or Capper-Volstead marketing cooperatives. Certain NIDA members compete at retail and wholesale with processing and manufacturing divisions or subsidiaries of their supplier cooperatives.

Petitioner is an independent proprietary dairy processor. NIDA members, are as vitally concerned as Petitioner about the issues presented in the Petition. Many members are dependent on Capper-Volstead cooperatives for fifty percent (50%) or more of their fluid milk supplies. Their economic viability

depends upon an uninterrupted supply of fluid milk at reasonable prices. After packaging milk and manufacturing their products, many compete directly with their supplier for the same accounts. All independent proprietary dairy processors will be adversely affected by legal errors in the decisions below which have the effect of expanding antitrust immunity for Capper-Volstead cooperatives in a manner unintended by Congress by raising the standard for proving antitrust violations by cooperatives beyond that universally applied to other industries.

NIDA's views also represent concerns of the independent dairy farmers. Independent farmer producers are often targets of larger cooperatives who seek membership by eliminating alternative markets for independent producers. NIDA members have traditionally provided outlets for independent production. Injury to competition in production markets is directly connected to competition in the wholesale and retail markets for milk products. Elimination of independent producers or their coercion into cooperative membership will further accelerate the regional and national concentration of control in cooperatives over the production and sale of dairy products, while further excluding both processors and farmers as competitors.

STATEMENT OF THE CASE

Plaintiff, a milk processor, sued defendant, a Capper-Volstead dairy cooperative, and demonstrated that:

(a) by agreements, defendant and other independent Georgia cooperatives organized the Georgia Super Pool, which collectively controlled ninety percent (90%) of the milk in Georgia by requiring sale of surplus milk through Dairymen, Inc. (D.I.) as its sole agent and by "repooling," fixed prices, allocated customers, and engaged in a group boycott of customers outside the cartel;

(b) by agreements, defendant and a midwest federation of independent cooperatives, Great Lakes-Southern Milk, Inc.,

fixed prices, allocated customers, divided territories and controlled the supply of milk from one geographic region to another; and

(c) by agreements, defendant and a group of independent midwestern cooperatives known as the "Standby Pool," organized for the purpose of jointly buying up and allocating among member cooperatives excess and unregulated upper midwest supplies of Grade A milk, fixed the price for such milk and boycotted non-member buyers of such milk.

Although plaintiff did not appeal the trial court's erroneous ruling that this conduct did not violate Sherman Act Section 1, analysis of this joint conduct is essential to an understanding of the errors made by both courts below in defining the scope of the Capper-Volstead exemption and the burden of proof in Section 2 Sherman Act cases against cooperatives.

Plaintiff further demonstrated that:

(a) defendant possessed 48-60% of the raw milk market in Kentucky, Tennessee, Georgia, Mississippi, and Louisiana; that defendant's share of the raw milk market in Georgia was 60-75%; and that as a result of the agreements enumerated above, defendant had monopoly power in the Georgia market; that defendant obtained its monopoly by mergers, and the agreements outlined above, and has further obtained and exercised its monopoly by (1) divisions of customers and markets, (2) arbitrary price fixing and the unilateral abrogation of contracts obligating defendant to deliver milk at contract prices, (3) coercive refusals to deal with buyers purchasing milk from competing suppliers, (4) coercively obtaining illegal exclusive dealing contracts, (5) exclusion of competing suppliers from the market, and, (6) cartel agreements with other and independent cooperatives in other markets to prevent entry of milk supplies from those markets into the Georgia and Southeast milk markets;

(b) defendant's conduct, as enumerated, was done with the specific intent and dangerous probability of monopolizing the

supply of milk for distribution in the Georgia market and the retail sale of milk in that market; and,

(c) defendant's cartel agreements, as enumerated, constitute an unlawful conspiracy to monopolize the supply of milk in Georgia and the Southeastern United States.

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in affirming trial court rulings that expand the narrow, implied Capper-Volstead immunity, holding inter-cooperative supply restricting agreements totally immune from the Sherman Act, and applying a vague and undefined "predatory" standard to the Section 2 monopolization counts.

The Circuit Court erred in failing to reject the trial court's *arguendo* ruling allegedly made on non-Capper-Volstead grounds. That District Court ruling finding no antitrust liability in defendant's conduct even when allegedly ignoring the immunity coverage, was confused, illogical and merely a restatement of its own previous erroneous conclusion that Capper-Volstead immunity covered all of defendant's activities unless "predatory." The effect of these errors is to expand the Act's immunity. Congress only intended to protect the cooperative business form alone, not competition-excluding activities. The lower court's holdings also conflict with this Court's clear policy of narrowly construing implied exemptions, particularly for industries not otherwise regulated, from the antitrust laws.

The Eleventh Circuit Court additionally committed error in failing to reverse the trial court's ruling that Capper-Volstead immunity gives cooperatives unqualified rights under inter-cooperative federations and cartel arrangements between otherwise independent corporate cooperatives without regard to the anticompetitive effects of such arrangements or their conduct. The trial court erred by holding that the conspiracy provisions of the Sherman Act do not apply to cooperatives; the Circuit Court did so by implication when it ignored plaintiff's Section 2 conspiracy to monopolize claims.

The Eleventh Circuit Court also erred in ignoring the legal standard for Sherman Act Section 2 cases, announced by this Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) and *Maryland & Virginia Milk Producers Association* v. *United States*, 362 U.S. 458 (1960) (*Maryland and Virginia*). That standard requires evaluation of the whole of defendant's conduct on the grounds of whether it was exclusionary, and not whether it was "predatory," as required by the trial court and erroneously affirmed by the Circuit. Under this higher "predatory" standard, the trial court ignored the effects of defendant's far-ranging inter-cooperative cartel agreements. It also ignored the status of defendant as a market controlling competitor and supplier of plaintiff. It further ignored defendant's control of fluid milk supply for the purpose of enhancing price and profits beyond reasonable market levels for anticompetitive use against processor competitors. This Court has required a higher than normal duty on the part of a monopolist supplier to deal fairly with its customer competitor. *Otter Tail Power Company* v. *United States*, 410 U.S. 366, reh. denied, 411 U.S. 910 (1973); *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912). The trial court's rulings on defendant's other anticompetitive activities, unilaterally taken against plaintiff, such as supply cutoffs, breaking of contracts and pressure on independent farmers not to deal with Kinnett were also erroneously accepted by the Circuit Court. Such harsh treatment of a customer by a supplier raises questions about the motives and intent of such supplier, and requires a higher duty of scrutiny by the courts. The trial court viewed these acts separately, and found them business justified and nonpredatory. The Eleventh Circuit Court erred in failing to require the trial court to consider the combined anticompetitive effect of all of these hostile acts, individually justifiable or not, when viewed as a whole and in combination with defendant's cartel agreements, under *Maryland and Virginia* and *Grinnell*, *supra*. These legal errors expand the Capper-Volstead exemption to protect unlawful market power achieved through anticompetitive conduct of such cooperatives over and against not only processors, but also independent

farmers. The Circuit Court's decision creates a split among the Circuits at three levels: (a) over the scope of the exemption, (b) whether the conspiracy provisions of the Sherman Act apply to cooperatives at all, and (c) the correct standard to be applied in such Section 2 cases. This confusion injures competition, and creates chaos in administering the antitrust laws, cooperatives and markets for all agricultural products handled by cooperatives.

REASONS FOR GRANTING THE WRIT

I.

SCOPE OF THE CAPPER-VOLSTEAD EXEMPTION.

This case involves the scope of the Capper-Volstead exemption for agricultural cooperatives, and was not decided on other independent grounds, notwithstanding the trial court's ruling to the contrary.

The District Court, after an extensive but compartmentalized view of the evidence, ruled that defendant's activities were within the scope of Section 1 Capper-Volstead Act immunity and Section 6 of the Clayton Act. The court reasoned that defendant retained its Capper-Volstead immunity for all but "predatory" conduct, which the court claimed was not proved by evidence. The court then assumed *arguendo* that even if defendant did not have Capper-Volstead immunity, plaintiff's evidence failed to establish antitrust liability on the part of defendant, under traditional Sherman Act standards. 512 F. Supp. at 640-43. This indicates the confused view of the court. Without the exemption, formation of the co-op and its price-fixing would have been a *per se* violation of the Sherman Act Section 1.

The Eleventh Circuit Court perfunctorily affirmed. Over the dissent of Judge Morgan, two members of the Circuit Court selected the three remand issues in *United States* v. *Dairymen, Inc.*, 660 F.2d 192, at 195 (6th Cir. 1982), which were Kinnett's grounds for appeal, seemingly applied them to the trial court's conclusions, and affirmed *per curiam*. 715 F.2d

at 521. This cursory treatment of the trial court's opinion is insufficient to overcome what is clear on the face of the District Court's opinion: that the trial judge's "independent" finding resulted from its confusion about the scope of the Capper-Volstead immunity.

The trial court's confusion of the "predatory" and "competition-stifling" standards is obvious. Under the immunity analysis, the court had already concluded that defendant's conduct was both "not competition-stifling or predatory." 512 F. Supp. at 638. The independent grounds should be looked at as nothing more than a restatement of its conclusion under the "predatory" standard applied in the first analysis. This "predatory" standard resulted from the trial court's adoption of the erroneous rulings by a minority of other courts that cooperatives should somehow be afforded greater protection for their anticompetitive conduct than business corporations. The Circuit Court erred in not finding that the trial court never separated the two analyses as claimed.

It is apparent that both courts below failed to keep analytically distinct the question of the scope of the exemption afforded farmers forming agricultural cooperatives under Section 6 of the Clayton Act and the Capper-Volstead Act and the question of whether defendant cooperative's non-exempt conduct violated the Sherman Act. Both issues were merged into an ill-defined and confusing analytical process by the trial court granting total immunity for all but "predatory" conduct under the offenses defined by Section 2 of the Sherman Act. The result is a sharply broadened exemption. The Circuit Court failed to clarify this reasoning. Neither opinion defines the concept "predatory" in a way which makes it understandable or manageable in the administration of the exemption for cooperatives or the antitrust laws.

Thus, contrary to the language of the affirming decision, there were no independent grounds other than the application of the Capper-Volstead immunity to support the rulings.

There is no regulatory statute expressly governing the anticompetitive activities of agricultural cooperatives. Therefore, the scope of the antitrust exemption for agricultural cooperatives must be divined from the legislative history of the Capper-Volstead Act, which reveals that the purpose of the immunity was to be narrow and limited. Implied exemptions from the antitrust laws even under a regulatory statute are disfavored and to be narrowly construed. *Otter Tail Power Company* v. *United States*, *supra*.[1] The basic purposes of the agricultural exemption and the Capper-Volstead Act are limited to allowing farmers to form cooperatives, raise capital, issue stock and form agencies in common to market their products.[2]

It is clear that the proponents of the bill which became the Act were asking only for access to the advantages of the corporate *form* available to businessmen.[3] It is also clear that in their request, the proponents of the bill were not further asking that farmers be granted a special privilege under the antitrust laws.[4] They were asking only for the limited right to a

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[1] Implied exemptions from the antitrust laws are found only where there is an irreconcilable conflict between antitrust policy and the regulatory act involved, or an affirmative showing of legislative intent to repeal by implication. Bolter and Day, *Implied Trust Repeals: Principles for Analysis*, 86 Dickinson L. Rev. 447, 465-66 (1982).

[2] 7 U.S.C. § 291, *Maryland and Virginia*, *supra*.

[3] "The object of this bill is to authorize the producers of agricultural products to *form* associations for the purpose of collectively preparing for market and marketing their products." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1-3 (1921) (Emphasis added).

[4] "Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. *Instead of granting a class privilege, it aims to equalize existing privileges* by changing the law applicable to the ordinary business corporations so that farmers can take advantage of it." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1-3 (1921). (Emphasis added).

business form to put them on an equal competitive footing with business corporations.[5]

The House Report contains an unqualified assurance that the purpose was not to create special freedoms or privileges for cooperatives, nor allow them greater freedom under the antitrust laws than allowed non-exempt corporations.[6] Congressman Volstead added his personal assurance to that effect during Floor debate.[7]

In the closely related and contemporaneous exemption enacted for labor unions under Section 6 of the Clayton Act, this Court held that the exemption was limited to formation of a union and did not immunize activity violating the antitrust laws by the union once formed. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 433 (1921); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Association*, 274 U.S. 37 (1927). Even though there has been additional legislation substantial-

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[5] Senator Capper stated in debate over the language of the Act: "Mr. President, the Cooperative Marketing Bill as it was offered in both the Senate and the House seeks simply to make definite the law relating to cooperative organizations of farmers and *to establish a basis on which these organizations may be legally formed*. Its purpose is to give the farmer the same right to bargain collectively that is enjoyed by corporations." 62nd Cong. Rec. 2057 (Feb. 2nd, 1922). (Emphasis added).

[6] "In the event that associations authorized by this Bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law, but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1-3 (1921).

[7] "It is objected in some quarters that this repeals the Sherman Act as to farmers. That is not true anymore than it is true that a combination of two or three corporations violated the Act. Such combinations may or may not monopolize or restrain trade." 61st Cong. Rec. 1033 (1921).

ly broadening the labor exemption (Clayton Act, § 20, 29 U.S.C. § 52; Norris-La Guardia Act § 4. 29 U.S.C. § 104), and extensive affirmative regulation pursuant to a complex regulatory scheme enacted by Congress of the activities of unions, this Court has continued to narrowly construe the scope of the exemption for labor unions from antitrust constraints.

It is noteworthy that this Court has held the antitrust laws are applicable to the anticompetitive activities of labor unions and others when aimed at third parties, despite the fact that the express exemption for labor unions under Sections 6 and 20 of the Clayton Act and the Norris-La Guardia Act (29 U.S.C. § 104) is much broader than the implied exemption contained in the Capper-Volstead Act for agricultural cooperatives. This Court has also held the labor exemption much narrower than the holdings in this case for agricultural cooperatives, despite the fact that labor unions are affirmatively regulated under the Wagner Act (29 U.S.C. §§ 151 et seq.), the Taft-Hartley Act (29 U.S.C. §§ 141 et seq.), and the Landrum Griffin Act (29 U.S.C. §§ 158 et seq.). The absence of affirmative regulation of agricultural cooperatives or broad additional exempting legislation compels the conclusion that joint action by agricultural cooperatives aimed at excluding competitors is not exempt from the antitrust laws.

In addition to the clear legislative history of Capper-Volstead, and this Court's policy of narrowly construing implied exemptions to the antitrust laws, this Court has narrowly construed the exemption in cases involving both Section 1 and Section 2 of the Sherman Act for cooperatives. In *United States* v. *Borden Company*, 308 U.S. 188 (1939) this Court rejected the lower court's view that the Capper-Volstead Act modified the Sherman Act for dairy cooperatives by holding that the Capper-Volstead Act "does not authorize any combination or conspiracy with other persons in restraint of trade these producers may see fit to devise." 308 U.S. at 204-05. In *Maryland and Virginia*, *supra*, the Court held a milk cooperative's conduct in acquiring a competitor to be monopolization under Section 2 of the Sherman Act, stating: "The [Capper-

Volstead] Act does not suggest a Congressional desire to vest cooperatives with the unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way." 362 U.S. at 467; see also *National Broiler Marketing Association* v. *United States*, 436 U.S. 816 (1978).

The language of the Capper-Volstead Act, permitting cooperatives and their members to have "marketing agencies in common" and to make "the necessary contracts and agreements to effect such purposes," has never been definitely examined by this Court. Several lower courts, including the District Court in this case (512 F. Supp. at 630), have read this language as wholly exempting from Sections 1 and 2 of the Sherman Act all contracts and conspiracies between independent cooperatives and independent affiliations of geographically and legally separate cooperatives. *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *Fairdale Farms* v. *Yankee Milk, Inc.*, 635 F.2d 1037, (2nd Cir. 1980); 715 F.2d 30 (2nd Cir. 1983), *cert. denied*. ___ U.S. ___ (No. 83-749, 1984). These courts have read the statute as granting total Section 1 and Section 2 immunity for inter-cooperative conduct despite the absence of any supporting express language in the statute and clearly contrary rulings by this Court. Such a result greatly expands the scope of the exemption and leaves all who must deal with these entities totally defenseless in the face of their anticompetitive and exclusionary practices.

Amicus believes that the language of the Capper-Volstead Act and the prohibitions of the antitrust laws can more sensibly be reconciled without wholly emasculating antitrust policy, unduly expanding the scope of the exemption, and generating the confusion which these lower court opinions have spawned. When compared with the much broader exemption for the extensively and affirmatively regulated activity of labor unions, it is clear that the lower court opinions in this case have created a dangerous anomaly in the law for powerful regional

cooperatives. Such a result is wholly incompatible with the express language of the Capper-Volstead Act, the Congressional purpose in adopting it, express policies of this Court in construing implied exemptions to the antitrust laws and this Court's prior decisions interpreting it.

II.

STANDARDS UNDER THE SHERMAN ACT.

It is clear from legislative intent and judicial precedent that the cooperatives are to enjoy no greater freedom under the antitrust laws than business corporations. It follows that the antitrust standards applied to the marketplace functions and conduct of Capper-Volstead cooperatives should be no different as well.

To give effect to the Congressional purpose of permitting "marketing agencies in common," it is not necessary to broaden the language of the Act to permit contracts between independent cooperatives with the purpose or effect of unreasonably restraining or monopolizing competition with third parties. In conformity with the general policy that implied exemptions be read narrowly and only to the extent necessary to effectuate the purposes of the exempting statute, *United States* v. *Borden Co.*, *supra*, the exemption for joint action should be read to permit a common marketing agency and only those contracts "necessary" to establish the agency. Contracts between cooperatives going beyond this limited exemption and injuring third parties by virtue of their anticompetitive purpose or effect should be either *per se* illegal or subject to the rule of reason that they are valid only to the extent "necessary" to establishing the joint marketing agency. *Maryland and Virginia*, *supra*; see generally, Flynn, *Rethinking Sherman Act Section One Analysis: Three Proposals for Reducing the Chaos*, 49 *Antitrust L.J.* 1593, 1608-19 (1980).

In the only case reaching this Court where the conduct of a cooperative was found exempt under Section 6 of the Clayton

Act and the Capper-Volstead Act, *Sunkist Growers, Inc.* v. *Winkler & Smith Products Co.*, 370 U.S. 19, *reh. denied*, 370 U.S. 965 (1962), this Court reversed a ruling that a parent cooperative and its two wholly owned subsidiary cooperatives could be found separate persons for purposes of Sections 1 and 2 of the Sherman Act. This Court held that the parties charged with conspiring in restraint of trade were "in practical effect and in contemplation of the statutes one 'organization' or association even though they have formally organized themselves into three separate entities." 370 U.S. at 29.

Unlike *Sunkist Growers*, the joint action complained of in this case is not conduct involving parent/subsidiary cooperatives having an identity of membership. The joint action in the instant case is the product of contracts and conspiracies between wholly independent cooperatives without identical membership or officers and operating in different sections of the country. Consequently, the case is distinguishable from *Sunkist Growers*, and is a case where the normal rules of antitrust conspiracy doctrine should apply. See Warbek & Brill, *Cooperatives Vis-a-Vis Corporations: Size, Antitrust and Immunity*, 33 *So. Dak. L. Rev.* 561, 578-79 (1978).

Thus, by recognizing the narrow scope of the Capper-Volstead exemption, the Circuit Court should have required the District Court to apply traditional Section 1 legal tests to defendant's combinations and conspiracies to determine their evidentiary weight for Section 2 consideration. Plaintiff's allegations and proof established illegal contracts and conspiracies with the purpose and effect of: (1) fixing prices—per se illegal under *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); (2) allocating customers—per se illegal under *United States* v. *Topco Associates, Inc.*, 495 U.S. 596 (1972); (3) engaging in a group boycott—per se illegal under *Fashion Originators Guild of America* v. *F.T.C.*, 312 U.S. 457 (1941); and (4) coercively imposed exclusive dealing arrangements—illegal under the standards of *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949); *Atlantic Richfield Refining Co.* v. *F.T.C.*, 381 U.S. 357 (1965); *F.T.C.* v. *Texaco, Inc.*, 393 U.S.

223 (1968). Each violation had an injurious effect on plaintiff and caused it measurable damage. When such actions are viewed as Section 1 violations, they not only undermine the District Court's independent analysis, but also give to defendant's joint agreements and conduct greater evidentiary weight under Section 2 than if viewed as immune and therefore justifiable business conduct.

The Circuit Court did not expressly review, and let stand, the erroneous finding of the District Court that intercooperative agreements were immune under the Capper-Volstead Act and not subject to Sherman Act Section 1 scrutiny, but implicitly did so by ignoring these violations in its analysis of plaintiff's Section 2 claims.

The District Court, as part of its analysis of the scope of the Capper-Volstead exemption, adopted a heavy standard of proof for antitrust plaintiffs, one found nowhere else in Section 2 Sherman Act jurisprudence. The District Court held that cooperative activities were exempt from antitrust subject only to the caveat that they must be "confined to farmers and their organizations and not include 'outsiders' and must not include 'predatory' activities." 512 F. Supp. at 630-31. Furthermore, the District Court expressly rejected this Court's general rule for evaluating monopolistic conduct in *Grinnell*, *supra*, holding that: "*Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means." 512 F. Supp. at 631. The Circuit Court in its *per curiam* opinion affirmed the District Court's finding that "defendant had 'no conscious intent to stifle competition.' " (715 F.2d at 521), and further held that the District Court used the word "predatory" in "its broadest sense." 715 F.2d at 521. The *per curiam* opinion concluded therefore, that the District Court's test was not incompatible with this Court's monopolization precedent or with the opinion of *United States* v. *Dairymen, Inc.*, *supra*, a case involving the same facts and defendant, and an opinion rejecting the higher and undefined burden of proving

"predatory" conduct. The Eleventh Circuit opinion clearly misreads the District Court opinion, because the trial court expressly applied a higher and different standard for Section 2 cases requiring proof that conduct be "predatory" rather than "exclusionary" or competition-stifling.

Furthermore, this Court required in *Continental Ore* v. *Union Carbide*, 370 U.S. 690 (1962) that the defendant's conduct must be evaluated by reference to the "whole picture," and that "the plaintiff should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clear after scrutinizing of each." 370 U.S. at 698-99. The "predatory" test results in general disregard of the cumulative effect of evidence otherwise relevant but not individually pernicious.

The adoption of this "predatory" test by some courts has created a rift with the Circuits which have followed the traditional methods of scrutinizing conduct under the antitrust laws required by this Court. The Sixth, Eighth and Ninth Circuits have squarely rejected the "predatory" test, and the Second and Eleventh Circuits have required or affirmed it.

The contrary holding by the Sixth Circuit in *United States* v. *Dairymen, Inc., supra*, shows clearly how unusual and troublesome this rift is in the Circuits. Two Circuits (Sixth and Eleventh) reviewed the same facts and same conduct of the same defendant under the same law and came to two different decisions.

In *Alexander* v. *National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982), the Eighth Circuit, quoting the Sixth Circuit in *United States* v. *Dairymen, Inc.*, stated:

> That Court squarely rejected the argument that Section 2 prohibits co-ops only from engaging in narrowly defined "predatory practices." We agree. 687 F.2d at 1183.

In *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), the Ninth Circuit Court held that where the jury found specific intent and monopoly power, there was

no need to find that defendants engaged in "predatory" conduct as well.

The District Court relied upon *Fairdale Farms* v. *Yankee Milk, Inc., supra.*, for its definition of "predatory." The *Fairdale* court held that "*Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other predatory means." 635 F.2d at 1045.

The Eleventh Circuit's opinion in this case and the Second Circuit's opinion in *Fairdale* are not only in conflict with the Sixth Circuit's opinion in *United States* v. *Dairymen, Inc., supra*, and this Court's standard in *Grinnell*, and every other Section 2 precedent of this Court, but is also in conflict with the antitrust standards this Court has consistently applied in the limited number of cases involving agricultural cooperatives claiming immunity under Section 6 of the Clayton Act and the Capper-Volstead Act. See *United States* v. *Borden Co., supra; Maryland and Virginia Milk, supra.* The Eleventh and Second Circuit opinions seek to read into the Court's clear holding in *Maryland and Virginia* an undefined pernicious element to the standard of plaintiff's proof, while the Sixth, Eighth and Ninth Circuits have correctly construed that opinion as requiring the standard announced in *Grinnell.*

This Court concluded in *Maryland and Virginia*, that the immunity extends only to independent farmers forming a cooperative and that the immunity does not "include a privilege to combine with competitors so as to use a monopoly position as a level further to suppress competition by and among independent producers and processors" (362 U.S. at 472), nor "leave cooperatives free to engage in practices against other persons in order to monopolize trade or restrain and suppress competition with the cooperatives" (362 U.S. at 467). This plainly means that traditional Sherman Act standards under Section 2 are fully applicable to the activities of cooperatives, and for that matter, under Section 1 as well.

The predatory standard is simply an unsupported reach by the agricultural cooperatives to legalize their conduct to willfully acquire and maintain monopoly power against some of the very farmers which Capper-Volstead was enacted to protect. From the standpoint of the fair and efficient administration of the law, it is also the use of an undefined and ambiguous concept—one certain to produce differing legal results for the same conduct as in the unusual case here of two Circuits reaching contrary results on the same facts, conduct, law and defendant.

In light of conflicts among the Circuits and the unrestrained accumulation of power by the cooperatives, this Court should clarify that its decision in *Maryland and Virginia* did not announce a "predatory" standard. The holding in that case was not based on strictly predatory acts. Rather, it requires courts to impose the traditional *Grinnell* test, and this Court should stem the rising tide of lower courts holding to the contrary.

III.

HARMFUL EFFECTS OF THE RIFT IN CIRCUITS.

The Petition is replete with descriptions of the extensive artificial restraints on current dairy markets. Cooperatives currently supply about seventy-five percent (75%) of raw milk processed. For this Court to allow the lower courts to broaden the scope of the Capper-Volstead exemption is to further increase their control and diminishes competition in the industry.

This unwarranted protection afforded cooperatives accelerates and deepens the current rift in Circuits over the standards applicable and the correct method of reasoning required in such cases. It is unlikely that the Circuit and District Courts can or will bring conformity to these decisions by themselves. The Federal Marketing Order areas, the pooling arrangements of the cooperatives and the relevant geographic areas established by the courts all cross and re-cross Circuit and District Courts' jurisdictional lines. By squarely rejecting fel-

low court decisions, the courts force processors and cooperatives to pursue two different courses of conduct in the same marketing areas and engage in forum shopping.

The rift in Circuits harms the administration of the Capper-Volstead exemption, antitrust laws, markets and cooperatives. It harms administration of the exemption by expanding it beyond Congress' intention. It confuses the antitrust laws by undermining this Court's policy of narrowly construing such implied exemptions. It harms the dairy markets by further concentration of market power into the multi-billion dollar cooperatives, removing them from remaining competitive market disciplines of supply and demand further contributing to the imbalance in our dairy surpluses. The resulting disorder in the markets, including unrestrained use of premium price enhancements, over and above Federal order prices, harms not only Kinnett, but all independent non-cooperative enterprises dealing in dairy products, and the consumer. The requirement by the cooperatives that independent processors sign committed supply agreements directly injures independent, non-member farmers, by leaving them with no market for their product. This unusual rift in Circuits also confuses administration of the cooperatives, by sending them conflicting signals, and encouraging exclusionary behavior in search of the outer limits of a vague, uncertain standard.

CONCLUSION

This Court is respectfully requested to grant the Petition to settle the question of the scope of the Capper-Volstead immunity, to settle differences among the Circuits in interpreting the exemption, to define the scope of legitimate inter-cooperative joint activity, to bring order to administration of antitrust laws in the exemption, to protect the independent proprietary dairy processors and producers from anti-competitive effects of aggressive agricultural cooperatives, and to give clear, meaningful guidance to cooperatives regarding permissible conduct, thus restoring competitive order to milk marketing. The need for a clear articulation of the scope of the Capper-

Volstead exemption is in the national interest, and *Amicus* respectfully requests this Court to grant the Petition.

Respectfully submitted,

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